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IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF MULTIJURISDICTION PRACTICE (NAAMJP) ET. AL.,
PETITIONERS,

v.

ALBERTO R. GONZALES, ANTHONY J. SCIRICA, CHIEF JUDGE OF THE THIRD CIRCUIT JUDICIAL COUNCIL ET. AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT CERTIORARI

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QUESTIONS PRESENTED

1. This Court has supervisory responsibility over federal district court "local" rules. Frazier v. Heebe, Chief Judge of the Eastern District of Louisiana, 482 U.S. 641, 645 (1987). In Frazier, this Court applied a heightened "necessary and rational" standard of review Id. at 646, to invalidate the challenged "local" rules, and held the location of a lawyer's office has nothing to do with his or her intellectual ability or experience in litigating cases in Federal District Court. Id. at 650. Subsequently in 1988, Congress revised the Rules Enabling Act. because of a proliferation of balkanized local rules, many of which were inconsistent with the national rules. Hence, 28 U.S.C. 2072(b) now provides federal district court local rules "shall not abridge, enlarge or modify any substantive right." And, 28 U.S.C. 2071(a) provides "local" rules "shall be consistent with Acts of Congress and rules of practice and procedure prescribed under Section 2072." The question presented is whether a United States District Court may require that applicants for general admission to its bar be licensed in the State where that court sits.

2. Fifth Amendment due process counsels no man shall be a judge in his own case. Congress revised the Rules Enabling Act in 1988 because of a further finding it was impossible to obtain meaningful judicial review because the judges who make the "local" rules decide whether they are valid, and because it is impracticable and impolitic for litigants to challenge "local" rules in the Courts they are appearing. Congress thus enacted 28 U.S.C. 332(d)(4) and placed on each respondent United States Judicial Council, a mandatory periodic continuing duty to review and abrogate any federal district court "local" rules that were not consistent under 28 U.S.C. 2071(a), or that "abridge, enlarge, or modify any substantive right" under 28 U.S.C. 2072(b). The question presented here is whether the "Not Precedential" decision below dismissing petitioners' Class

Action, and further enjoining petitioners and petitioners' counsel from filing a similar challenge to federal district court local rules without prior Court approval, violates the Rules Enabling Act, and petitioners' Fifth Amendment substantive rights to due process and equal protection, and/or constitutes impermissible governmental censorship, viewpoint discrimination, and an overbroad prior restraint on the right to petition under the First Amendment.

PARTIES TO THE PROCEEDING

Plaintiffs/Petitioners

National Association for the Advancement of Multijurisdiction Practice,(NAAMJP)
John F. O'Rourke, Alan Ellis, Donald Harris.

Defendants/Respondents

Alberto R. Gonzales, United States Department of Justice.

Anthony J. Scirica, Chief Judge of the Third Circuit Judicial Council, Dolores K. Sloviter, Jane R. Roth, Theodore A. McKee, Marjorie O. Rendell, James T. Giles, Thomas Vaniske, Sue L. Robinson, Doretta W. Ambrose, Garrett Brown Jr., members of the Third Circuit Judicial Council.

Douglas B. Ginsburg, Chief Judge of the District of Columbia Judicial Council, David B. Sentelle, Karen Lecraft Henderson, A. Raymond Randolph, Judith W. Rogers, David S. Tatel, Merrick B.Garland, Thomas F. Hogan, Emmet G. Sullivan, James Robertson, Richard W. Roberts, Ellen Segal Huvelle, Reggie B. Walton, members of the District of Columbia Judicial Council.

Hon. Mary M. Schroeder, Chief Judge of the Ninth Circuit Judicial Council, Arthur Alarcon, Alex Kozinski, Kim McLane Wardlaw, Marsha Berzon, Andrew J. Kleinfeld, B. Lynn Winmill, Stephen M. McNamee, Terry J. Hatter, Charles R. Breyer, Roger G. Strand, members of the Ninth Circuit Judicial Council.

Hon. John W. Bissell, Chief Judge for the United States District Court for the District of New Jersey, Dennis M. Cavanaugh, Joseph A. Greenway, Jr., Katharine S. Hayden, Faith S.

Hochberg, Jose L. Linares, William J. Martini, Joel A. Pisano, Alfred M. Wolfin, judges on the Court.

Hon. Consuelo B. Marshall, Chief Judge of the United States District Court for the Central District of California, Percy Anderson, Terry J. Hatter, Jr., Ronald S.W. Lew, Nora M. Manella, Howard A. Matz, James S. Otero, Dean D. Pregerson, George P. Schiavelli, Christina A. Snyder, John F. Walter, judges on the Court.

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OPINIONS BELOW

The Order entered by the Eastern District of Pennsylvania was entered on March 23, 2006. This Order is not published. It is set forth in the Appendix 11a-22a. The Third Circuit's decision affirming was filed on December 21, 2006. It is not published. It is set forth in the Appendix 1a-10a.

JURISDICTION

This Court has supervisory responsibility over federal district court "local" rules. Frazier v. Heebe, Chief Judge of the Eastern District of Louisiana, 482 U.S. 641, 645 (1987). This Court has jurisdiction for this petition under 28 U.S.C. § 1254.

RELEVANT PROVISIONS INVOLVED

This case involves the Supremacy Clause, First and Fifth Amendments, and the Rules Enabling Act. The pertinent text is set forth in the Petition or Appendix 23a-28a.

NOTIFICATION REQUIRED BY RULE 29.4

Service of process on defense counsel and the Solicitor General is made.

STATEMENT

INTRODUCTION In Frazier v. Heebe, *supra*, this Supreme Court summarized the question for decision: "The question for decision is whether a United States District Court may require that applicants for general admission to its bar either reside or maintain an office in the State where that court sits." Id. at 642-43. This question is almost identical to the question for decision presented in this case, i.e., "Whether a United States District Court may require that applicants for general admission to its bar be licensed in the State where that court sits." This Supreme Court answered in the negative. The decisions below answer in the opposite.

Similar bar admission challenges to categorical exclusionary rules for outsiders are now before this Court in LaClerc v. Webb 06-11 and Wallace v. Calogero 05-1645. These bar admission challenges are similar because they are filed under the Supremacy Clause; argue the Courts below erred in applying rational basis review rather than heightened scrutiny; and maintain the challenged exclusionary rules cannot even pass a rational basis standard of review. Additionally, as will be subsequently discussed, the Department of Justice arguments and Supremacy Clause analysis submitted the Courts below affirmed chapter and verse — are the polar opposite of what the DOJ argued under the Supremacy Clause to the Arizona Supreme Court in their petition for reciprocal state admission on motion.

Frederick Douglass was the Martin Luther King, Jr. of his era. Frederick Douglass the man didn't change when he escaped slavery in Maryland and moved to Boston and New York. The only thing that changed was the state's categorical classification of him. Petitioners challenge federal district court "local" rules that blindly bootstrap state categorical classifications that treat sister-state attorneys and federal practice specialists as is if they are inferior beings: Rather than as members of the bar, instruments of justice, and United States citizens.

FACTS Frazier v. Heebe, Chief Judge of the Eastern District of Louisiana, 482 U.S. 641 (1987), is the last case this Court decided on the validity of federal district court "local" licensing rules. The District Court and the Fifth Circuit upheld the challenged *general* admission rules as rational. This Court, however, reversed and held the District Court was not empowered to adopt rules requiring members of the Louisiana Bar who apply for admission to its bar to live, or maintain an office, in Louisiana. This Court held the location of a lawyer's office has nothing to do with his or her intellectual ability or experience in litigating cases in Federal District Court. Id. at 650

In reaching that decision, filed before Congress revised the Rules Enabling Act in 1988, this Court exercised its supervisory powers and applied a heightened scrutiny "unnecessary and irrational" standard of review Id. at 646, rather than the strict scrutiny applied in Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985). "Unnecessary and irrational" equal a heightened standard "rational and necessary." This Court concluded the "in-state residence" rules violated both prongs "unnecessary and irrational;" Frazer, 482 U.S. at 646. "We find the in-state office requirement unnecessary and irrational." Id. at 649.

This Court entered other legal conclusions to justify reversal, Id. at 646-49, the decisions below because of local prejudice closed their eyes and ears to including: (i) there is no reason to believe that in-state attorneys are any more competent than out-of-state attorneys; (ii) there is no need for a blanket rule that denies all nonresident attorneys admission to a district court bar; (iii) modern communication systems make it possible to minimize unavailability; (iv) there is no link between residency within a state and proximity to a courthouse, Id. at 650; (v) pro hac vice admission is not a viable alternative because it does not allow nonresident attorneys to practice on the same terms as resident members of the bar, Id. at 650-51; (vi) Such (pro hac vice) association imposes a financial and administrative burden on nonresident counsel. Ibid.

This Court in Frazier v. Heebe further provided other relevant analysis the decisions below paid no deference. This Court, in footnote 7, stated:

> Rules that discriminate against nonresident attorneys are even more difficult to justify in the context of federal-court practice than they are in the area of state-court practice, where laws and procedures may differ substantially from State to State. See Comisky & Patterson, The Case for a Federally Created National Bar by Rule or by

> Legislation, 55 Temp. L. Q. 945, 960-964 (1982). There is a growing body of specialized federal law and a more mobile federal bar, accompanied by an increased demand for specialized legal services regardless of state boundaries. See Simonelli, State Regulation of a Federal License to Practice Law, 56 N.Y. State Bar J. 15 (May 1984). The Court's supervisory power over federal courts allows the Court to intervene to protect the integrity of the federal system, while its authority over state-court bars is limited to enforcing federal constitutional requirements. Because of these differences, the Court has repeatedly emphasized, for example, that disqualification from membership from a state bar does not necessarily lead to disqualification from a federal bar. 482 U.S. at 647

After Frazier v. Heebe was decided, Congress substantially revised the Rules Enabling Act. Congress found "that there was a proliferation of local rules, many of which conflict with the national rules of applicability." See David D. Siegel, Commentary on 1988 Revision, Text after 28 U.S.C.A. 2071 p. 520.

> 28 U.S.C. 2071(a) provides, "...Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under Section 2072."
>
> 28 U.S.C. 2072(b) provides, "Such [federal district court local] rules shall not abridge, enlarge or modify any substantive right."

Congress also revised the Rules Enabling Act because it was displeased with "the barrier to interlocutory appeal built into federal practice under §§ 1291 and 1292 of Title 28 [that] made appellate review of such a rule impossible sometimes, impractical most times, and impolitic always."

See Siegel, Commentary on 1988 Revision (text after 28 U.S.C.A. § 332 p. 553). See Weinstein, Reform of the Federal Rule-Making Process, 63 A.B.A.J. 47 (1977)("There is no real opportunity to challenge the rules in litigation since the judges who will decide the case are often the ones who adopted the rules.") Ibid. Congress thus placed on the Judicial Circuits an affirmative continuing supervisory responsibility to review the local rules to assure their compliance with 28 U.S.C. §§ 2071 et. seq. There is no such thing as a rule becoming sacrosanct merely for having passed judicial council scrutiny the first time. See 28 U.S.C.A. 2071 Commentary of 1988 Revisions at p. 522. It is subject to on-going scrutiny, as are all rules in existence on December 31, 1988. Ibid.

28 U.S.C. § 332(d)(4) provides:

> Each judicial council shall periodically review the rules which are prescribed under Section 2071 of this title by district courts within its circuit for consistency with rules prescribed under section 2072 of this title. Each judicial counsel may modify or abrogate any such rule found inconsistent in the course of such a review.

Petitioners in this Class Action filed under FRCP 23(b)(2) include the National Association for the Advancement of Multijurisdiction Practice, a nonprofit public benefit corporation. The NAAMJP has as its political purpose to engage in expressive association, and to petition the government for redress of grievances, on behalf of its members and itself as an association including the adoption of the ABA MJP Commission recommendations. See 67a-70a. Declaration of Kenneth Owen, Esq., an officer and director of NAAMJP. Kenneth Owen is an Arizona licensed attorney specializing in immigration. He further claims direct injury because he is categorically disqualified for admission on motion to the Pennsylvania Supreme Court and Eastern

District of Pennsylvania because Arizona does not have reciprocity with Pennsylvania. The named petitioners, whose individual allegations will be subsequently addressed, further sue on behalf of themselves, and as members of the NAAMJP. These federal practice specialists are at the apex of the attorney learning curve.

Petitioners allege federal district court local rules affect all American citizens across our Union, and not just attorneys admitted in the forum state that are made "the special favorites of the law." Petitioners allege they have standing and are directly injured by being categorically denied the rights: to *general* admission petition privileges they pay for with their tax dollars; to choose and select their own counsel of choice to exercise their expressive association and petition rights in the federal district courts; and by being compelled to categorically pay and associate with local counsel they neither want nor need.

Petitioners present a "facial" challenge and "as applied" challenge. Petitioners allege the local rules are overbroad. They are overinclusive and underinclusive because brand new novice attorneys from the forum state are categorically presumed qualified, and experienced federal practice attorneys from outside the forum state are categorically presumed not qualified. Petitioners allege as members of the bar and officers of the Court that they take their professional responsibilities seriously, and do not present a clear and present danger that warrants the categorical suppression and prior restraint on their sacred First Amendment freedoms.

Petitioner NAAMJP is directly injured because it is barred by the challenged "minefield of inconsistent" local rules from filing this exact same lawsuit on behalf of its members by the respondent Central District of California, and the District of Columbia, and in numerous other federal district courts, because of local attorney *general* admission rules that categorically, regardless of individual merit or federal practice experience, deny *general* admission petition

privileges to out-of-state licensed attorneys. (67a-70a) The NAAMJP has filed this Class Action lawsuit on behalf of itself and others similarly situated because, as previously noted, appellate review of such local rules, as Congress has declared in amending the Rules Enabling Act, "is impossible sometimes, impractical most times, and impolitic always." See Siegel, Commentary on 1988 Revision, *supra*, (text after 28 U.S.C.A. § 332 p. 553).

Petitioner John F. O'Rourke, Esq. is a Vietnam Veteran with a service connected disability, an award winning engineer, and a graduate of the ABA accredited Temple University School of Law. Petitioner is a federal practice expert specializing in patent law. See 39a-54a Declaration of John F. O'Rourke. Petitioner is admitted to practice before the United States Patent and Trademark Office, and numerous other state and federal courts. Petitioner alleges he has scientific training in many specialized fields including chemistry, anatomy, physiology, microbiology, and nuclear engineering. Petitioner's patent practice is national and international.

Article 1 § 14 provides "Congress shall have the power: To make rules for the government." Article I § 18 provides, "Congress shall have the power: To make all laws which shall be necessary and proper for carrying into execution the foregoing powers." "A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give 'the State's licensing board a virtual power of review over the federal determination.'" Sperry v. Florida, 373 U.S. 379, 385 (1963). States do not have jurisdiction over patent law, and no state tests patent law on its bar examination.

Nevertheless, petitioner John F. O'Rourke is categorically disqualified for *general* admission to the bar of the federal district courts in California by federal district court local rules because he is not a member of the State Bar of California. Petitioner is also categorically disqualified for *pro hac vice* admission under the local rules because he lives

and works in California. See Paciulian v. George 229 F.3d 1226 (9th Cir. 2000) (*per curiam* holding sister-state licensed attorneys who live or work in California are ineligible for pro hac vice admission in California).

Petitioner alleges he is injured and foreclosed from employment opportunities working as a patent lawyer in California and elsewhere. Petitioner has been told by legal recruiters and knows from his own experience that he is considered "unavailable" for patent litigation. (52a ¶ 47) Petitioner alleges he is stigmatized, treated as a member of a subclass, and placed at a competitive disadvantage by hostile and categorical local rules. (51a-54a). The effect of these local rules is they "steer business almost exclusively to the in-state bar." Frazier, 482 U.S. at 461 n. 12.

Petitioner Alan Ellis, Esq. is a graduate of the ABA accredited Villanova Law School. He is former editor of the *Villanova Law Review* and received the *Constitutional Law Award*. See 55a-64a Declaration of Alan Ellis. He has twice served as a law clerk for federal judges in the Eastern District of Pennsylvania. He is a former President of the National Association of Criminal Defense Lawyers. He has a national federal criminal practice, and he writes monthly columns for the American Bar Association on federal criminal sentencing. Petitioner is the co-author of the Federal *Prison Guidebook*, the *Federal Sentencing Guidebook*, and the *Federal Post Conviction Guidebook*. Petitioner has been regularly interviewed by the national media, and is thought of by some as the "Michael Jordan" of his federal practice specialty.

Petitioner Alan Ellis alleges it would be either impossible or extraordinarily burdensome to conduct a national criminal federal practice if the federal law specialist was required to be admitted in every single state in which there is a federal district court. Petitioner alleges the prohibitive costs would far outweigh the benefit because State law has virtually nothing to do with his federal criminal practice specialty. Petitioner alleges this increased cost interferes with the public's increased demand for specialized

legal services, and puts him at a competitive disadvantage. Petitioner alleges there is no corresponding benefit by the challenged local rules because State bar examinations do not test his specialized area of federal practice, including habeas and federal sentencing guidelines. Petitioner alleges the local rules also handicap the Courts because expert federal practice specialists, because of their experience, can make the Court's job easier. Petitioner alleges regardless of where he practices that he is still subject to reciprocal discipline, the State's Rules of Professional Conduct, and the federal court's Rules of Professional Conduct. Petitioner alleges that if he is qualified for *pro hac vice* admission then he is qualified for general admission.

Petitioner further alleges injury because one out of eight Americans lives in California. Petitioner is not a member of the State Bar of California. He does not practice state law. Petitioner alleges direct and continuing concrete injury because he has been disqualified from *pro hac vice* admission in the Southern District of California because he has a regional office in California. See U.S. v. Walters, 309 F.3d 589 (9th Cir. 2002)(holding the denial of Alan Ellis's application for *pro hac vice* admission deprived his client of his 6th Amendment right to counsel but was harmless error.) Petitioner alleges if the challenged local rule prior restraints are invalidated that deny him general admission, he will apply for admission, and he will be able to represent his clients without delay and unjustifiable expense, and avoid the duplication of unnecessary work. (60a)

Petitioner Donald Harris, Esq. is a Yale graduate and a resident of Ohio. He is a member of the bar of the District of Columbia. Article I § 4 of the Constitution provides, "The Congress shall have the power: To establish ... uniform laws on the subject of bankruptcies throughout the United States." The Bankruptcy Courts local rule-making authority is governed by 28 U.S.C. § 2075. "Such rules shall not abridge, enlarge, or modify any substantive right." See 28 U.S.C. § 2075(b). Bankruptcy law is also not tested on any State's bar

examination. Petitioner has a national federal bankruptcy practice. Petitioner alleges that he has been injured by his inability to practice in United States Bankruptcy Courts by local federal rules that are not uniform and that "piggy-back" state admission rules. See Declaration of Donald Harris (66a).

Petitioners submitted 25 Exhibits (A-Y) in support of their Motion for Declaratory Judgment and Injunctive Relief. Petitioners' listed and summarizing the Exhibits filed. (29a-38a). This summary was filed in the trial Court. All 25 exhibits filed in this matter of public concern in a public forum are downloadable in full from PACER 24-7. These Exhibits were submitted as evidence without opposing counsel objection. The Orders below hides each and every exhibit by omitting reference to them and the proof they establish.

The American Bar Association in 1995 officially recommended that the challenged federal district court "local" rules, which restrict practice privileges to lawyers who are admitted to the state bar in which the district courts sits — should be eliminated. (82a-85a). The American Bar Association concluded: "Given the global nature of law practice today, parochial local rules are inefficient, unduly costly to clients and/or lawyers and anti-competitive." (85a).

Professor Charles Wolfram, the Reporter for the American Law Institute, concludes, "[T]o an observer, membership in the bar of the federal courts looks like the work of petty fiefdoms of medieval Europe . . . Someday, sensible admission to the federal courts will be federal in nature." Wolfram, Modern Legal Ethics (1986), § 15.2.4 p. 853.

"A National Action Plan on Lawyer Conduct and Professionalism" (Adopted by the Conference of Chief Justices January 21, 1999), declares "National legal practice in multiple jurisdictions increasingly is the rule rather than the exception, particularly given improvements in communication and transportation technology. The appellate

courts of highest jurisdiction should not only provide leadership and coordination of professionalism and legal ethics programs within their own states, but also should encourage interstate cooperation." (33a-35a).

A U.S. Judicial Conference study concludes federal district court admission rules are a "minefield of inconsistency." *infra*, 801-56. Marie Leary of the Federal Judicial Center prepared an extensive report entitled "Eligibility Requirements for, and Restrictions on, Practice before the Federal District Court," November 7, 1995, ("Leary Report") *Working Papers of the Committee on Rules and of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct* 125-182 (Administrative Office of the United States Courts 1997). This report is quoted and referenced in Moore's Federal Practice, *infra*.

Moore's Federal Practice 3rd Ed., Judith A. McMorrow and Daniel R. Coquillette, "The Federal Law of Attorney Conduct," § 801.20(3) Criteria for General Admission, 55 of the 94 federal district courts limit their bar admission to members of the state where the district court sits. Id. at 801-56.:

According to the "Leary Report:

> This extraordinary diversity of bar requirements was almost completely random in terms of characteristics of the district courts, with rural districts and urban districts; districts on tropical islands; western, southern, northern and eastern districts; and large and small districts all showing no particular predilection for any model. The primary justification for divergent local rules, special needs inherent to a particular district, appeared to be almost completely lacking. Indeed, because many of these local rules were adopted before the 1988 revision to 28 U.S.C. § 2071(b) requiring "appropriate public notice and comment," there is little in the record of why individual courts chose the model they did. Ibid.

The Leary Report further reports the challenged local rules are radically different and have no perceived pattern even for the admission of federal government attorneys. "This is a hardship for the Department of Justice, and other government attorneys, a hardship that has been emphasized by representatives of the Department of Justice." Id. p 801-58.

The National Conference of Bar Examiners Admission on Motion Statistics report that 27,255 attorneys were admitted to another State's Bar on Motion in between 1999-2004. (35a-36a). These 27,255 "mainstream" attorneys admitted on motion to the States were categorically disqualified for *general* admission petition privileges to the bar regardless of individual merit, under the "extremist" "local" rules of the respondent United States District Courts for the Districts of New Jersey and California. Admission to the state bar on motion is not available in these states. The federal practice specialist has to reinvent the wheel.

The American Bar Association recognized the practice of law has dramatically changed in this Information Age and bar admission rules have lagged far behind. The ABA thus formed an MJP Commission and held nationwide open hearings and received comments from virtually every arm of the bar. The Commission's findings were subjected to further comment and peer review. This MJP Commission was staffed by leading lawyers from around our nation. Harriet Miers was the Chair until she stepped down to be President Bush's White House counsel. Audio transcripts or written transcripts of public hearings conducted in New York, Philadelphia, Atlanta, Chicago, Kansas City, San Diego, Dallas, and Miami are reported on the ABA's web site at http://www.abanet.org/cpr/mjp/mjp-trans_discuss.html. In addition to live testimony, over a 100 written position papers were submitted in support of MJP by the multiple ABA sections, multiple state and local bar associations, and such organizations as the Conference of Chief Justices, National Conference of Bar Examiners, Department of Defense, Department of the Army, United States Navy, General

Motors, United States Chamber of Commerce, Association of Corporate Counsel, Federal Communications Bar Association, Association of Professional Responsibility Lawyers, National Client Protection Association, and the American Arbitration Association.

The American Bar Association MJP Commission's (2002) findings and recommendations were adopted by the ABA. Among other maters, the ABA, in a seismic, if not revolutionary, change recommended reciprocal bar admission on motion for experienced attorneys. The ABA also recommended reciprocal discipline. An attorney who is disciplined in one state cannot then avoid that discipline by moving to another state. This Court has held the ABA standards are the benchmark for reasonableness.

The ABA MJP Commission, in its report "Client Needs in the 21st Century," See www.abanet.org/cpr/mjp Report 201G, "RESOLVED, that the American Bar Association adopts the proposed Model Rule on Admission by Motion, dated August 2002. (72a-81a) In essence, the Model Rule provides an attorney in good standing who graduates from an ABA accredited law school, and has four years of experience is qualified for admission on motion. The ABA concluded it is not reasonable to make such an attorney reinvent the wheel and take another bar examination to practice in another state.

The State Conference of Chief Justices has endorsed this ABA MJP Commission Report. (71a). This Recommendation has been endorsed by the National Conference of Bar Examiners. The American Bar Association Section on Legal Education and Admissions has concluded the failure of states to provide reciprocity is punitive and not rationally related to public protection. See Jay Stiglitz, "A Modest Proposal: The Model Rule on Admission on Motion" The Bar Examiner (Aug 2002) p. 31. "The committee conclude(s) that such provisions are punitive and do not tend to reflect the standards of admission that are rationally related to the state's interest in public protection

and the administration of justice." Id. at 34. The ABA indicates that 35 states have adopted admission on motion in one form or another.

Some states have expressly held that it is not their responsibility or right to determine who is admitted in the federal courts. In Re McCue, 211 Cal. 57, 66 (1930).

The United States Judicial Conference corroborates the ABA's conclusion. "No one has yet devised an examination which will test one's ability to be a courtroom advocate." Report and Tentative Recommendations of the Committee to Practice in the Federal Courts in the Judicial Conference of the United States. 79 F.R.D. 187, 196. There is a correlation between the quality of trial performance and the prior experience of the attorneys evaluated. 83 F.R.D. at 222.

The American Bar Association recommended the policy of reciprocal admission on motion for experienced attorneys without taking another bar examination for valid reasons. Susan M. Case, Ph.D. is the Director of Testing for the National Conference of Bar Examiners. Dr. Case writes, "Testing for licensure is intended to provide evidence that an individual possess sufficient knowledge and skills necessary for *entry level* professional practice." See Susan M. Case, The Bar Examiner p. 27 (November 2005). Licensure is a government function designed to protect the public from unnecessary risks. See Michael T. Kane, "The Role of Licensure Tests," The Bar Examiner p. 28 (November 2005). Bar examinations test for *entry level* competence. Ibid. Dr. Kane writes, the preferred approach for measuring *entry level* competence would be to evaluate performance in practice directly (rather than to simulate practice on a pen and pencil test). Id. at 34. Attorneys who have practiced successfully and safely in another jurisdiction without injuring the public, in other words according to the ABA, have already demonstrated more than "entry level" competence. The proof is in the pudding.

Adding to the persuasiveness of the American Bar Association's Recommendations, the Conference of Chief

Justices in August 1996 (33a-35a, Exhibit R) concluded bar examinations for new applicants rarely require more than superficial demonstration of competence, and "they fail to provide an effective measure of basic competence for new lawyers." Clark D. Cunningham, The Bar Examiner p. 7 (November 2005). "Professionalism cannot be adequately assessed in a one time paper and pencil test." Ibid. Lawyers and judges, like fine wine, get better with age. One cannot become an expert without experience. Practice makes perfect.

Additionally, if a layman is presumed to know the law, or is able to look it up on the internet, it is not rational to presume an experienced federal practice expert in the 21st Century cannot. If a layman is presumed to be qualified to represent himself or choose his own counsel, it is not rational to presume an experienced attorney is not similarly qualified. It is no secret and this Court has recognized that most states that have put up fence against out-of-state attorneys have done so primarily to protect their lawyers from professional competition. Supreme Court of New Hampshire v. Piper, *supra*, 470 U.S. 274, fn. 17

Dr. Case and Dr. Kane of the National Conference of Bar Examiners and other experts in psychometrics are guided by Standards for Educational and Psychological Testing, (Published by the American Educational Research Association, American Psychological Association, National Council on Measurement in Education, 1999, 2d Ed. 2004). The federal government including the Department of Justice has recognized these Standards as generally accepted and authoritative. See 29 C.F.R. § 1607.5C.

These Standards make clear that, "No test is valid for all purposes or in all situations." See Standard 1.2 p. 17. "It is the interpretations of test scores required by proposed uses that are evaluated and not the test itself." Id. at 9. "Alternatives to testing that are readily available should be evaluated," Id. at 4, and "community standards in the professional field in which the test applies should be evaluated." Ibid. Test developers and users have the

responsibility to provide support for their own rationale for the use of the test. See Standard 1.1.p. 17. Respondents have not submitted any empirical evidence why they have rejected the ABA conclusion it is not necessary for experienced attorneys to take another bar examination or why petitioners should be excluded from federal admission. Respondents have not submitted evidence they have even considered the ABA standards or the petitioners' qualifications.

Gary Klein Ph.D. has spent his career studying how people make decisions for the United States Military and other institutions. In Klein, Sources of Power (The MIT Press 1999) *Chapter 10 The Power to See the Invisible*, Dr. Klein explains "There are many things experts can see that are invisible to everyone else: (i) Patterns that novices do not notice; (ii) Anomalies – events that did not happen and other violations of expectancies; (iii) The big picture (situation awareness); (iv) The way things work; (v) Opportunities and improvisations; (vi) Events that either already happened (the past) or are going to happen (the future); (vii) Differences that are too small for novices to detect; (viii) Their own limitations." Id. at 148-49. Each of these is virtually invisible to novices.

Dr. Klein sees a relationship between expertise and age, and "the accumulation of experience does not weigh people down; it lightens them up." Id. at 147. Dr. Klein's test results further show that experts are generally not affected by extreme time pressure and their first reaction is almost always based on pattern recognition and the right one. Id. at 175. Dr. Klein, in controlled experimental tests, played videotapes for three audiences: ten novices who had just finished an 8 hour CPR course, ten CPR instructors who were experienced teachers but have never performed CPR on an actual victim, and ten paramedics who had used CPR many times. The study asked each participant to imagine it was his or her life on the line. They had to identify one of six people in the videotapes who they would want to do CPR on them. Nine out of ten actual paramedics picked the actual

paramedic. When asked why, they could not point to any one thing other than he seemed to know what he was doing. The novices generally chose the paramedic. Only three of 10 instructors chose the paramedic to save their lives. According to the instructors the paramedic was not following the rules carefully according to their instructions. (89a.-91a).

PROCEEDINGS BELOW Petitioners filed a 27 page First Amended Class Action Complaint (130a-155a) and 25 exhibits in support. Petitioners filed a 63 page Motion for Declaratory Judgment and Injunctive Relief. The DOJ filed a joint Opposition and Motion to Dismiss for failure to state a claim. The District Court requested additional briefing particularly with reference to personal jurisdiction (93a). Petitioners filed a Reply Argument (93a-130a) specifically addressing standing and why the Court has personal jurisdiction over the parties and controversy. The District Court in a non-published Order addressed both cross motions. The Court denied petitioners' Motion for Declaratory Judgment and dismissed petitioners First Amended Class Action based on various claimed procedural deficiencies including the Court did not have jurisdiction over the parties under FRCP 12(b)(2) and on the merits. The District Court held:

(i) This is at least the third time petitioners' and their counsel have sought to invalidate the challenged local rules (13a), and these challenges were rejected by other courts in the past and they are rejected here as well;

(ii) The local rules do not violate the Rules Enabling Act and they are not inconsistent (16a), other courts have so held. (iii) The First Amendment claims are dismissed because it is rational for the federal court to rely on admission to the state bar and other courts have so held (17a);

(iv) "The Supremacy Clause is dismissed because the challenged local rules are creatures of federal law, not state law, and thus cannot conflict or contradict with federal law" (16a-17a);

(v) The Fifth Amendment due process and equal protection claims are dismissed because the local rules do not discriminate and they are rational and other courts have so held (18a-19a).

The District Court further enjoined petitioners and petitioners' counsel from filing any further papers challenging any jurisdiction's local rules of admission without prior leave of the Court; and without first proving the claims can survive a Rule 12(b) challenge and are not barred by principles of claim or issue preclusion.

Petitioners timely appealed. The Third Circuit affirmed in a decision that states on its face "Not Precedential." It holds petitioners failed to prove that the guardians of the Constitution and agents of the United States government had sufficient contacts to establish personal jurisdiction in the United States District Court. (6a). The Court further held even if it had personal jurisdiction, the Court lacked personal jurisdiction over the entire case because petitioners failed to establish standing. (6a). Petitioners failed to prove how they were injured by the local rules. (8a) The Court held the Class Action could not be salvaged because petitioners were not injured. (8a-9a). The Court, in closing, held petitioners "cannot claim standing under the First Amendment exception which allows a plaintiff to challenge a statute which could, by its very existence chill expression even where he has not suffered injury" (10a n.5), because the Court "find(s) the challenged local rules do not violate the First Amendment and, therefore, the appellants lack standing." .

THE DOJ PETITION ON BEHALF OF THE UNITED STATES OF AMERICA TO THE ARIZONA SUPREME COURT FOR ADMISSION ON MOTION

The Third Circuit failed to address the Supplemental Authority petitioners uncovered and submitted. The United States Attorney for Arizona on behalf of the United States of America filed a Petition to Amend Rule 38(a) 06-002 in the Arizona Supreme Court. (155a-165a). This DOJ Petition

requests the Arizona Supreme Court to amend it rules, and grant DOJ attorneys the freedom to appear in the Arizona State Courts on behalf of the government — without being a member of the State Bar of Arizona; without the necessity of appearing pro hac vice; without associating an Arizona licensed attorney; and without having to pay a fee to the State Court.

This DOJ Petition filed in Arizona illustrates the government does not subscribe to its own arguments that it submitted to the Courts below. The DOJ in Arizona argues (158a) the applicability of the Supremacy Clause and Sperry v. Florida, 373 U.S. 379 (1963). The DOJ argues the fees payable to the Arizona Supreme Court by non-Arizona attorneys is a "money exaction the payment of which…would be required before executing a function of government, and accordingly is prohibited by the Supremacy Clause." (158a-159a) The DOJ argues the requirement of *pro hac vice* association with local counsel "requires the Attorney General to double staff cases;" (185a) and "imposes significant burdens on already stretched Federal Government resources;" (159a), and "place[s] considerable obligations on local counsel," (159a) who may not have "specialized expertise." (160a)

The DOJ's arguments to the Arizona Supreme Court on behalf of the United States government parallel petitioners' arguments on behalf of the People of the United States in this Petition for Certiorari.

REASONS FOR GRANTING THE PETITION

1. The Decisions Below Undermine the Viability of the United States as a Single Entity and Contradicts Due Process and Equal Protection Norms

This Court should exercise its supervisory responsibility and grant review in this petition because this case presents an important and recurring pure question of law that only this Court can answer. There is no dispute as to any

material fact. This Court twenty years ago in Frazier v. Heebe, recognized, "There is a growing body of specialized federal law and a more mobile federal bar, accompanied by an increased demand for specialized legal services regardless of state boundaries". 482 U.S. at 647 n.7. Twenty years ago, the internet and computers and the Information Age were in its infancy. Laptops, palm pilots, cell phones, and I-pods were not household appliances. Since Frazier v. Heebe was decided, the ABA has formally recommended these balkanized rules be eliminated. Congress has revised the Rules Enabling Act because of a proliferation of balkanized local rules. The "Leary Report." found a "minefield of inconsistency." Over 27,000 attorneys were admitted on motion to various states from 1999-2004 that are categorically disqualified from *general* bar admission petition privileges in 55 federal district courts. These 55 federal district courts have rejected the conclusions of the ABA and the Conference of Chief Justices.

This Court should also exercise its supervisory responsibility because this petition presents analogous issues that are presently pending before the Court in LaClerc v. Webb 06-11 and Wallace v. Calogero 05-1645. These bar admission challenges are similar because they are filed under the Supremacy Clause; argue the Courts below erred in applying rational basis review rather than heightened scrutiny; and maintain the challenged exclusionary rules cannot even pass a rational basis standard of review. Petitioners here, as in LaClerc and Wallace, make clear that attorneys who are considered outsiders who champion locally unpopular claims and seek to vindicate federal rights are particularly susceptible to invidious discrimination and government censorship. See Supreme Court of New Hampshire v. Piper, *supra*, 470 U.S. 274, 281 (holding an attorney's opportunity to practice law is a fundamental right protected by the Constitution because out-of-state licensed attorneys have a constitutional duty to champion locally unpopular claims and vindicate federal rights.)

In contrast to LaClerc and Wallace, adding further warrant for review is this Court's supervisory responsibility over local rules. This constitutes a non-delegable duty. As a mother or father cannot delegate responsibility for their children, only this Court can exercise supervisory responsibility over the Article III courts minefield of inconsistent local rules.

This Court has consistently struck down categorical presumptions that stereotype and treat American citizens unequally in the exercise of their citizenship rights based on status. This Court has expressly held state bar admission on motion rules cannot discriminate against out-of-state attorneys. Supreme Court of Virginia v. Friedman, 487 U.S. 59, 67 (1988). See Romer v. Evans, 517 U.S. 620 (1996) (holding Colorado statute categorically disqualifying gays and lesbians from particular protections of the law is not rational and violates equal protection.). In Lawrence v. Texas, 539 U.S. 558 (2003), this Court invalided a state statute that made it a crime for two persons of the same sex to engage in certain intimate conduct under the Due Process Clause. There is little difference between a statute that prohibits intimate sexual conduct and local rules that prohibit certain confidential attorney-client relationships. The right to exercise one's liberty with regard to matters of sex should not be greater than one's liberty to engage in expressive association or petition the United States government for redress of grievances. Often, a citizen's choice of counsel, as the President's choice of Supreme Court Justice, is one of the most important and lasting decisions he will make.

This Court should also grant review because it is impossible to get meaningful judicial review over these rules in any other court. "(N)o man ought certainly to be a judge in his own cause, or in any cause, in respect to which he has the least interest or bias." See Hamilton, Federalist No. 80, p. 414 (Gideon Edition). The District Judge below found his own Court's local rules were "rational." The Third Circuit summarily affirmed. One of the Third Circuit hearing judges

was a 10 year member of the respondent Judicial Council. (11a) Justice must satisfy the appearance of justice. That has not happened in this case. Petitioners were denied the right to discovery, the government was excused from complying with the mandatory disclosure requirements, and petitioners were denied the right to present oral argument. Petitioners, in short, were shunned and belittled as if they were blacks sitting at a lunch counter in Alabama in the 1960s.

This Court should also exercise its supervisory responsibility because the relationship of the courts below, when the Court itself is a party and the judge, with the United States Attorney's office providing defense counsel, presents an unbreakable bond that tramples due process. This is similar to the judge being the judge, witness, and defense counsel. The legal arguments advanced by the Assistant US Attorney below that the Courts below copied and affirmed are the polar opposite of the legal arguments posited by the Department of Justice before the Arizona Supreme Court. The DOJ, when they are not statutorily required to provide defense counsel, is on record as claiming injury by these disparate admission rules. This DOJ conflict of interest has irreparably injured petitioners because the Courts below, in fashioning its decisions, copied and relied on the legal arguments submitted by the government. Many of those arguments blatantly misrepresent the facts and contradict petitioners' Exhibits A-Y. Petitioners were denied the right to ask the AG such questions as: (i) Do you have any empirical evidence or reason to believe that former federal law clerks or government attorneys become less qualified to function in private practice?; (ii) Are attorneys from Texas less qualified to represent their clients or practice federal law in the District of Columbia than members of the District of Columbia bar? (36a Exhibits X,Y)

This respondent conflict of interest is further intensified because the DOJ has recommended splitting the Ninth Circuit because justice has been compromised there. Many of the decisions defense counsel argued and the Courts

below adopted as binding precedent are decisions which are not published. These decisions under Ninth Circuit local rules cannot be cited as precedent. The Ninth Circuit was the leading opponent to citation of unpublished decisions.

The consequence of this Court not granting review will present a serious likelihood of undermining public confidence in the impartiality and integrity of the judiciary. Contrary to the impression left by the "Not Precedential" decisions below, there is no published case challenging the balkanized local rules adjudicated under: (i) the Rules Enabling Act as amended in 1988; (ii) Supremacy Clause; or (iii) the First Amendment freedoms petitioners submitted in this case. The only published decision that challenges local federal district court local rules was decided 17 years ago. That decision, was argued in pro se by petitioners counsel, Giannini v. Real, 911 F.2d 354 (9th Cir. 1990) *cert. denied* 498 U.S. 1012, (1991). The facts and legal arguments presented at that time were not fully matured. That decision is also inapplicable because it relies on the Rules Enabling Act before it was amended in 1988. The Ninth Circuit applied the old law Congress specifically disavowed. Petitioners assert that decision is also flawed, notwithstanding the dramatic changes in fact and law in the last 17 years, because it collapses this Court's Frazier v. Heebe, "unnecessary and irrational" standard of review to the rational basis standard.

This Court should also grant review because it has recognized free competition in the practice of law is healthy. Economic protection is not a rational governmental interest. *See* FTC v. Superior Court Trial Lawyers Assn. 493 U.S. 411 (1989)

> "(U)ltimately competition will produce not only lower prices, but also better goods and services.' National Society of Professional Engineers v. United States, 435 S. 679, 695 (1978). This judgment 'recognizes that all elements of a bargain — quality, service,

safety, and durability — and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.'" Trial Lawyers, *supra*, 493 U.S. at 423. "That is equally so when the quality of legal advocacy rather, than engineering design, is at issue." Id. at 424.

2. This Court Should Grant Review Because The Lower Court's Use of the Rational Basis Standard of Review Nullifies the *Rule Enabling Act* and This Court's Precedent

The decision below nullifies the Rules Enabling Act. The right to counsel is a substantive and constitutional right as is the right to petition the federal court for the redress of grievances. The decisions below rocket over these important issues, and the Judicial Conference study reporting the licensing rules are a "minefield of inconsistency." The decision also nullifies this Court's decision in Supreme Court of Virginia v. Friedman, *supra*, 487 U.S. 59, 67 (1988), holding state bar admission on motion rules cannot discriminate against out-of-state attorneys. This case concerns a pure question of federal law.

The challenged local rules contradict the national rules of practice and procedure and Acts of Congress. Congress has enacted 5 U.S.C. § 500(b) providing all licensed American attorneys in good standing are qualified to appear as *counsel* before federal administrative agencies. Congress has also ratified national rules of practice and procedure that were prescribed under 28 U.S.C. § 2072. FRAP 46 authorizes all licensed American attorneys in good standing eligibility for admission to the federal courts of appeal. This Court's Rule 5 authorizes all licensed American attorneys in good standing with three years experience to apply for admission. One-third of the federal district courts, by local rule, authorize all sister-state attorneys *general* admission.

The challenged local rules inconsistency on its face violates 28 U.S.C. §§ 2071(a) and 2072(b). The language of 28 U.S.C. § 2071(a) is mandatory "shall be consistent." These rules per se enlarge the rights of forum state attorneys, and they abridge and modify the rights of non-forum state attorneys. These rules abridge and modify the rights of all Americans to obtain non-forum state attorney representation.

More specifically, District of New Jersey Local Rule 101(b) limits general admission to New Jersey licensed lawyers. New Jersey has rejected the ABA Model Rule for admission on motion. An out-of-state attorney is compelled to accept the markedly inferior *pro hac vice* admission available, and has to pay annual bar dues to the State of New Jersey as long as he is appearing *pro hac vice* in the federal case for this second class status. Local Rule 101(c). Moreover, her client has to pay two lawyers in the District of New Jersey to perform services that could be more efficiently and expeditiously performed by one federal practice specialist. The power to tax the right to petition is the power to destroy. See McCulloch v. Maryland, 17 U.S. 316 (1819)(held state governments have no right to tax any of the constitutional means employed by the government of the Union to execute its constitutional powers.)

In contrast, with the NJ local rule licensing fees payable to the State of New Jersey Lawyers' Fund for Client Protection for second class federal privileges — a licensing tax that is not authorized by Congress — Western District of Pennsylvania LR 83.2.1 C authorizes general admission to "Any person who is a member in good standing of the bar of the Supreme Court of Pennsylvania, or a member in good standing of the Supreme Court of the United States, or a member in good standing of any United States district court, may be admitted to practice before the bar of this court." Approximately one third of the federal district courts have local admission rules paralleling the Western District of Pennsylvania.

In further contrast, the Eastern District of Pennsylvania limits *general* admission to Pennsylvania licensed attorneys. The State of Pennsylvania, however, has adopted Pennsylvania Bar Admission Rule 204, an admission on motion provision for States that provide reciprocity to Pennsylvania attorneys. Attorneys from 18 states are categorically denied admission on motion to the Pennsylvania Supreme Court because these states do not grant Keystone State lawyers the same reciprocal privilege. Thus, these lawyers are vicariously disqualified from *general* admission on motion in the Eastern District of Pennsylvania, based on the State of Pennsylvania's "you get reciprocity if we get reciprocity" policy incorporated by the local rules of the Eastern District of Pennsylvania. Contrary to the decisions below, petitioner Kenneth Owens is not eligible for bar admission to the bar of the Eastern District.

In California, where the State Bar of California (and its $100 million dollar budget) is the Ninth Circuit's biggest fan in its never ending battle to avoid being split, petitioners are denied both general and *pro hac vice* admission.

Likewise, petitioners are denied the freedom to file this case in the District of Columbia by that Court's exclusionary local rules that compel sister-state attorneys to incur and pay substantial State licensing fees to exercise their federal right to petition.

The paradigm echoed in the Rules Enabling Act is a well settled constitutional principle. See Marbury v. Madison, 5 U.S. 137 (1803)(held that the original jurisdiction of the Supreme Court prescribed by the Constitution, could not be enlarged or modified by a subsequent Act of Congress); U.S. Term Limits, Inc.. v. Thornton, 514 U.S. 779 (1995) (held neither Congress nor the State could add qualifications to the Constitution's text).

The decisions' application of the rational basis standard of review nullifies this Court's Supremacy Clause jurisprudence. In Sperry v. Florida, 373 U.S. 379 (1963), the Florida Bar successfully sued in the Supreme Court of

Florida to enjoin a member of the bar of the United States Patent and Trademark Office from performing specified acts within the State. This Court reversed, finding a violation of the Supremacy Clause.

The local rules that delegate the right to determine federal admission to state licensing officials constitutes an impermissible federal delegation of federal jurisdiction. In Nguyen v. United States 539 U.S. 69 (2003), this Court reversed a federal court of appeals for merely having an Article IV judge sitting on a panel. Here, every state licensing official in every village and hamlet has the right to tax and deprive the petitioners of their federal rights.

3. This Court Should Grant Review Because the Lower Court Decisions Nullify the First Amendment and This Court's First Amendment Jurisprudence

This decision nullifies the First Amendment and this Court's precedent. This Court has held in Supreme Court of Virginia v. Friedman, *supra*, 487 U.S. at 67, state bar admission on motion rules cannot discriminate against out-of-state attorneys. If states cannot discriminate in admission on motion, it follows neither can federal district courts.

In Mine Workers v. Illinois Bar Assn., 389 U.S. 217 (1967), this Court held the trial court's decree preventing petitioner labor union from hiring attorneys on a salary basis to assist its members in asserting their legal rights violates the freedom of speech, assembly, and petition provisions of the First Amendment as incorporated by the Fourteenth Amendment. This Court held no restraints by legislation or otherwise upon First Amendment rights can be sustained merely because they were imposed for the purpose of dealing with some evil within the State's competence. Id. at 222.

This Court has held an attorney's opportunity to practice law is a fundamental right entitled to constitutional protection because attorneys have a constitutional duty in our Union to vindicate federal rights and champion locally

unpopular claims. Supreme Court of New Hampshire v. Piper, *supra,* 470 U.S. at 281. The function of attorneys is to speak, associate with his or her client, and petition for the redress of grievances. The right to petition is one of "the most precious of the liberties safeguarded by the Bill of Rights." BE & K Construction Co. v NLRB, 536 U.S. 516, 524 (2004) "The First Amendment historically provides greater protection from prior restraints than after-the-fact penalties, and enjoining a lawsuit could be characterized as a prior restraint." Id. at 530.

The Third Circuit's "Not Precedential" decision on a Class Action, filed by out-of-state licensed attorneys seeking to vindicate federal rights on an unpopular claim by the mere fact it is not published undercuts its creditability and persuasiveness. Secrecy is not congenial to truth-seeking. Although the decision states it is "Not Precedential," it performs the function of binding precedent. The decision enjoins petitioners and petitioners' counsel from presenting similar claims in the future. The decision further states the issues are claim or issue precluded unless the petitioners can prove otherwise. Petitioners submit this decision is a prior restraint that constitutes censorship in a public forum on matters of public interest. According to the Rules Enabling Act, there is no such thing as a rule becoming sacrosanct merely for having passed judicial council scrutiny the first time. See 28 U.S.C.A. 2071 Commentary of 1988 Revisions, *supra*, at p. 522.

Petitioners, however, are now and forever restrained from performing their constitutional duty and championing these locally unpopular claims unless this Court grants review. The core political purpose of petitioner NAAMJP and its members is to champion the ABA MJP Commission's Recommendations. The decisions below castrate petitioners. The cherished and necessary freedom to dissent has been eliminated. See for example, the first John Marshall Harlan's dissent, "Our Constitution is color-blind, and neither knows

nor tolerates classes among citizens." Plessy v. Ferguson, 163 U.S. 537, 559. (1896).

Petitioners believe this Court should also exercise its supervisory responsibility and grant review because this Class Action case presents multiple important and recurring First Amendment issues that were buried by the Courts below. In First Amendment overbreadth cases, courts allow litigants to "challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court." Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620, 634 (1980). This is because of the "possibility that protected speech or associative activities may be inhibited by the overly broad reach of the statute." Ibid.

Another important legal issue presented and left unanswered by the decisions below concerns the question of whether local rules impose unnecessary financial burdens on those who seek to use the federal courts. A law is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content or subject matter of their speech. Simon & Schuster v. Crime Victims Bd., *supra*, 502 U.S. 105 (1991). The First Amendment freedoms are supposed to be free. Local rules that compel citizens to pay two attorneys for one petition is not freedom.

Another important and recurring issue presented but not addressed is whether the challenged admission rules are "viewpoint discrimination." A regulation that denies one group of citizens the right to address a selected audience on controversial issues of public policy is plainly viewpoint discrimination. Consolidated Edison Co. v. Public Serv. Comn'n, 447 U.S. 530, 546 (1980). Viewpoint discrimination is a particularly egregious form of content discrimination. It is presumptively unconstitutional. Our government is prohibited from favoring one viewpoint over another. See Rosenberger v. Rector And Visitors of Univ. of VA, 515 U.S. 819 (1995) "A law or policy permitting communication in a

certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official." Lakewood v. Plain Dealer Publishing Co, 486 U.S. 750, 763 (1988).

Another important legal issue presented and left unanswered by the decisions below concerns the question of whether the local rules constitute "content discrimination" and "burdens a category of speech." In Republican Party of Minn. v. White, 536 U.S. 765 (2002), the question presented was whether the First Amendment permits a State Supreme Court to prohibit candidates for judicial office in the State from announcing their views on disputed legal and political issues. This Court held the judicial canon burdened speech based on its "content" and it burdened "a category of speech" that is at the core of the First Amendment. Petitioners assert the local rules burden a "category of speech," i.e. their federal specialty, on which they have developed considerable specialization and skill. Petitioners assert local rules that delegate to state licensing officials unbridled discretion over experienced attorneys as to who may speak and who may not on federal law subjects these official know nothing about is "content discrimination."

CONCLUSION

In view of the foregoing, this Court is requested to grant review. If this Court also grants certiorari in LaClerc and Wallace, it should consolidate all of these cases for briefing and argument.

Respectfully submitted,
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(any footnotes trail end of each document)

NOT PRECEDENTIAL

No. 06-2420

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF MULTIJURISDICTION PRACTICE; JOHN F. O'ROURKE; ALAN ELLIS; DONALD HARRIS,

Appellants

v.

ALBERTO GONZALES; JOHN W. BISSELL, Honorable, Chief Judge for the United States District Court for the District of New Jersey; DENNIS M. CAVANAUGH; JOSEPH A. GREENAWAY, JR.; KATHERINE S. HAYDEN; FAITH S. HOCHBERG; JOSE LINARES; WILLIAM MARTINI; JOEL A. PISANO; ALFRED M. WOLIN; CONSUELO B. MARSHALL, Chief Judge for the United States District Court for the Central District of California; PERCY ANDERSON; TERRY J. HATTER, JR.; RONALD S.W. LEW; NORA M. MANELLA; HOWARD A. MATZ; JAMES S. OTERO; DEAN D. PREGERSON; GEORGE P. SCHIAVELLI; CHRISTINA A. SNYDER; JOHN F. WALTER; ANTHONY J. SCIRICA, Chief Judge of the Third Circuit Judicial Council; DOLORES K. SLOVITER;

JANE R. ROTH; THEODORE A. MCKEE; MARJORIE O. RENDELL; JAMES T. GILES; THOMAS I. VANASKIE; SUE L. ROBINSON; DONETTA W. AMBROSE; GARRETT E. BROWN, U.S. District Judge; DOUGLAS B. GINSBURG, Chief Judge of the District of Columbia Judicial Council; DAVID B. SENTELLE; KAREN LECRAFT HENDERSON; A. RAYMOND RANDOLPH; JUDITH W. ROGERS; DAVID S. TATEL; MERRICK B. GARLAND; THOMAS F. HOGAN; EMMET G. SULLIVAN; JAMES ROBERTSON; RICHARD W. ROBERTS; ELLEN SEGAL HUVELLE; REGGIE B. WALTON;*

* (Amended per the Clerk's Order dated 5/12/06)

December 13, 2006, Submitted Under Third Circuit LAR 34.1(a)

December 21, 2006, Filed

NOTICE: RULES OF THE THIRD CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

JUDGES: Before: FISHER, CHAGARES and GREENBERG, Circuit Judges.

OPINION BY: FISHER

OPINION: OPINION OF THE COURT

FISHER, *Circuit Judge.*

The appellants, the National Association for the Advancement of Multijurisdiction Practice ("NAAMJP") and several of its members, appeal a decision by the District Court dismissing their complaint for lack of personal jurisdiction and failure to state a claim. Fed. R. Civ. P. 12(b)(2), (6). For the reasons set forth below, we will affirm the District Court's dismissal.

I.

The NAAMJP, a non-profit organization incorporated in California, and three of its members, John O'Rourke, Alan Ellis, and Donald Harris, brought suit in the Eastern District of Pennsylvania alleging that the local rules of approximately fifty-five federal district courts violate numerous provisions of the United States Constitution, the Rules Enabling Act, and the Federal Rules of Evidence, among others. The appellants allege that the local rules, which require that attorneys appearing in federal district courts either be licensed by the state in which the district court sits or meet some other criteria of eligibility, are inconsistent with each other and discriminate against out-of-state attorneys. For example, they challenge the rule in the Eastern District of Pennsylvania requiring that an out-of-state attorney be admitted to the Pennsylvania bar and permitting admission on motion to those lawyers who are licensed in states with reciprocal privileges. This kind of rule, the appellants argue, violates twelve constitutional principles, including the "constitutional norm of comity," four federal statutes, several federal rules of civil procedure, and two federal rules of evidence.

As far as we can tell, this is at least the fifth case that the NAAMJP or one of its members has filed challenging court rules that limit the ability of attorneys who have not passed the state bar examination to appear in court.[1] Four suits have been filed in California challenging the California Bar Association, the California Supreme Court, and the United States District Courts for the Central, Southern and Northern Districts of California. All four cases were dismissed with prejudice and the District Court for the Northern District of California imposed Rule 11 sanctions. The Ninth Circuit affirmed.

After losing all four cases in California, the appellants filed suit in the Eastern District of Pennsylvania naming as defendants President George W. Bush, Attorney General Alberto R. Gonzales, the Third Circuit Judicial Counsel, the Ninth Circuit Judicial Counsel, the District of Columbia Judicial Counsel, the Department of Justice, various judges of the District Court of New Jersey and individually each judge that is a member of the named judicial councils. The appellants do not allege that they applied for admission in accordance with the local rules and were barred from practicing before a particular district court. Rather, they allege that all federal district courts should have general admission privileges for non-forum state attorneys. In fact, Alan Ellis and John O'Rourke are both admitted in the Commonwealth of Pennsylvania, and Donald Harris is admitted in the state of Ohio, a state that has a reciprocal agreement with Pennsylvania. Therefore, any of the three attorneys is statutorily eligible to practice in front of the Eastern District of Pennsylvania.[2]

After a motion by the United States, the District Court dismissed the complaint for lack of personal jurisdiction, failure to comply with the "short and plain statement" requirement, Fed. R. Civ. P. 8, and failure to comply with the District Court's order directing the plaintiffs to address whether the District Court had jurisdiction. The District Court also found that each of the appellants' thirteen causes of action were substantively meritless, stating that it could dismiss the complaint on those grounds as well. After granting the motion to dismiss, it enjoined the NAAMJP from filing any further papers regarding the constitutionality of local rules without leave of the District Court. The appellants timely filed this appeal, challenging only the District Court's determination regarding the substance of the complaint. They fail to address personal jurisdiction, failure to offer a "short and plain statement" as required by Rule 8, and dismissal as a result of their failure to comply with the District Court's order.

II.

Before we can address the substance of the appellants' claims, we must satisfy ourselves that we have jurisdiction. A review of the record and the parties' briefs informs us that we do not.

As an initial matter, the appellants failed to show the District Court and, on appeal, have failed to show us, how the District Court exercised personal jurisdiction over the out-of-state defendants. A party that fails to raise an issue in its initial brief before this Court is deemed to have waived that issue. *In re Pressman-Gutman Co., Inc.*, 459 F.3d 383, 402 (3d Cir. 2006)

(quoting United *States v. Pelullo*, 399 F.3d 197, 222 (3d Cir. 2005)) ("'It is well settled that an appellant's failure to identify or argue an issue in his opening brief constitutes waiver of that issue on appeal.'"). In the face of a waiver, we may only reverse a district court when it commits plain error. *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 517 (3d Cir. 1997). Because we see, and the appellants have offered, no evidence suggesting the out-of-state defendants have established sufficient contacts with the forum state, it was not plain error for the District Court to dismiss for lack of personal jurisdiction.

Even if the appellants could establish that the District Court had personal jurisdiction over the out-of-state defendants, we lack jurisdiction over the entire case as they have not presented a legally redressable injury. It is a fundamental principle of American jurisprudence that before a party may bring a case before a court, he must have standing to do so. The Supreme Court has established that "the irreducible constitutional minimum of standing contains three elements[,]" injury in fact, causation and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). The party invoking federal jurisdiction bears the burden of proving standing, *id.* at 561, and we exercise plenary review over such questions. *Miller v. Nissan Motor Acceptance Corp.*, 362 F.3d 209, 220 n.15 (3d Cir. 2004). n3

To establish an injury in fact, a party must demonstrate the "invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotation marks and citations omitted). "In

other words, 'the plaintiff must show that he [or she] personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant [and][t]he injury must be concrete and capable of being redressed by the court should the plaintiff prevail on the merits.'" *Taliaferro v. Darby Twp. Zoning Bd.*, 458 F.3d 181, 188-89 (3d Cir. 2006) (quoting *Wheeler v. Travelers Ins. Co.*, 22 F.3d 534, 537-38 (3d Cir. 1994)). The appellants in this case have made no such showing.

In their complaint, the appellants stated that they have been "irreparably injured." However, while expounding in great detail on the foundations of our legal system, including a discussion between George Washington and Thomas Jefferson in a comic strip, they fail to expound in any manner upon the injuries they claim to have suffered. The complaint states that an "out-of-state attorney [seeking to appear before a court in New Jersey] is compelled to accept the markedly inferior *pro hac vice* admission . . ." n4 and that "these lawyers are vicariously disqualified from general admission on motion in the Eastern District of Pennsylvania, based on the State of Pennsylvania's 'horse-trading' incorporated by the local rules . . . ." This is the entirety of the claimed injuries suffered by the appellants.

While the appellants have challenged the local court rules in approximately fifty- five district courts, they have made no showing that they were denied the ability to practice in any of those states or that they would seek to practice there but-for the local court rules. Further, two of the appellants, O'Rourke and Ellis, are admitted to practice in Pennsylvania and Harris is admitted to practice in Ohio, a state that has reciprocity

with Pennsylvania. Therefore all three are eligible to practice in front of the Eastern District of Pennsylvania, one of the primary courts they challenge.

The unnamed attorneys referred to in the complaint that allegedly suffered injuries because of the local rules cannot provide the appellants with standing either. *Taliaferro*, 458 F.3d at 189. A litigant may bring a case on behalf of a third party in only very limited circumstances where: "(1) the litigant has suffered an injury in fact, giving him a sufficiently concrete interest in the outcome of the issue; (2) the litigant has a close relation to the third party; and (3) there exists some hindrance to the third party's ability to protect his own interest." *Id.* at 189 n.4. The appellants in this case have failed to meet all three requirements, as they have not shown an injury, have provided no relationship to these unnamed attorneys, and have failed to suggest how practicing attorneys are unable to protect their own interests.

Because the appellants have not applied to practice in the federal district courts and been denied or made any showing that they would choose to do so in the future, they have failed to show how they are injured by the local court rules. *See Gilles v. Davis*, 427 F.3d 197, 208 (3d Cir. 2005) (stating plaintiffs lacked standing to challenge city permit ordinance where they had not applied for and been denied a permit). n5

The styling of the complaint as a class action does not salvage the appellants' case either. While the mooting of a plaintiff's claim after he has moved for class certification does not preclude him from representing the class, a plaintiff with no initial injury may not

choose to represent a class of which he is not part. "[A] plaintiff who lacks the personalized, redressable injury required for standing to assert claims on his own behalf would also lack standing to assert similar claims on behalf of a class." *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 135 (3d Cir. 2000). The constitutional standing requirement requires more than a cognizable injury to someone. The plaintiff himself must be among the injured. *Mariana v. Fisher*, 338 F.3d 189, 206 (3d Cir. 2003).

III.

A review of the record reveals that the appellants' fifth attempt to challenge local rules must fail for lack of jurisdiction. For the reasons set forth above, we will affirm the judgment of the District Court dismissing the appellants' claims and prohibiting them from filing further papers on this matter without leave of the District Court.

Footnotes

n1 Several of the initial suits were brought by Joseph Giannini, the appellants' counsel, as the named plaintiff.

n2 In fact, a cursory search on Westlaw reveals that both Mr. Ellis and Mr. O'Rourke have appeared on numerous occasions in front of the District Court for the Eastern District of Pennsylvania.

n3 Neither party addresses standing in its brief, but, as they are jurisdictional in nature, we are required to raise issues of standing *sua sponte* if they exist.

Addiction Specialists, Inc. v. Twp of Hampton, 411 F.3d 399, 405 (3d Cir. 2005).

n4 The appellants state no basis on which we can conclude that an attorney appearing *pro hac vice* is considered inferior to attorneys otherwise appearing in front of a court.

n5 The appellants cannot claim standing under the First Amendment exception which allows a plaintiff to challenge a statute which could, by its very existence, chill expression even where he has not suffered a concrete injury. *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973). We find that the challenged local rules clearly do not violate the First Amendment and, therefore, the appellants lack standing.

12/5/2006

No. 06-2420

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF MULTIJURISDICTION PRACTICE

v.

ALBERTO GONZALES, et al.

(Eastern District of Pennsylvania Civil No. 05-cv-05081)

PRESENT: GREENBERG, Circuit Judge.

Motion by Appellants for recusal of the Honorable Morton I. Greenberg.

Calendared 12/13/06

ORDER

The foregoing motion is denied.

By the Court,

s/ Morton I. Greenberg
Circuit Judge

Filed 3/23/06

Civil Action No.
05-cv- 5081

UNITED STATES DISTRICT COURT FOR FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NAAMJP et al.

v.

George W. Bush, et. al

ORDER

Plaintiffs, the National Association for the Advancement of Multijurisdictional Practice ("NAAMJP"), a nonprofit organization directed by Joseph Giannini (plaintiffs' counsel in this case), John O'Rourke, Alan Ellis, and Donald Harris filed a declaratory judgment complaint and motion for a preliminary and permanent injunction on September 23, 2005 alleging that numerous defendants, including President George W. Bush, Attorney General Alberto Gonzalez, the Department of Justice, various Judges from the United District Courts for the District of New Jersey,[1] Central District of California,[2] the members of the Ninth Circuit Judicial Council,[3] the members of the Third Circuit Judicial Council,[4] and the District of Columbia Judicial Council[5] violated 28 U.S.C. §§ 2071, 2072, and 332(4)(4) and numerous constitutional principles by failing to create homogeneous local rules for admission to the bars of

those jurisdictions. Plaintiffs filed an amended complaint on December 13, 2005 asserting class certification and stipulated to the voluntary dismissal of President Bush on January 26, 2006.

This is at least the third time that Giannini has brought such a claim before a district court. After failing the California Bar Examinations in July 1986 and February 1987, Giannini filed suit against the California Bar Examiners for denying his admission to practice in California even though he was licensed in Pennsylvania and New Jersey. See Giannini v. Comm. of Bar Examiners, 847 F.2d 1434 (9th Cir.1988). In that case, Giannini alleged that the California bar examination discriminated against out of state attorneys and violated the Privileges and Immunities Clause of Article IV, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and the Commerce Clause of the United States Constitution. Id. The District Court dismissed his complaint and the Court of Appeals for the Ninth Circuit affirmed. Id.

Giannini then filed suit in the Central District of California against the California Supreme Court and the Justices of that Court, the Committee of Bar Examiners and the Committee's individual members, and the United States District Courts for the Central, Southern, and Eastern Districts of California and the individual judges of those Courts. See Giannini v. Real, 711 F. Supp. 992 (C.D. Cal. 1989) aff'd 911 F.2d 354 (9th Cir.1990). In that case, Giannini challenged the constitutionality of local district court rules requiring attorneys to pass California's state bar examination before being admitted to practice in the United States

District Courts for the Central, Eastern, and Southern Districts of California. Id. The District Court upheld the local rule as consistent with the rules, practices, and procedures of the Supreme Court, and specifically held that the local rule did not violate equal protection or due process, full faith and credit, or the right to travel and rejected Giannini's arguments under 28 U.S.C. § 2071. Id. The Court of Appeals for the Ninth Circuit affirmed the District Court's dismissal and found that Giannini's challenges did not pass constitutional muster and that the local rule did not violate the Privileges and Immunities Clause of Article IV, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, or the Commerce Clause of the United States Constitution. Id.fn6

Giannini subsequently filed an action in the Northern District of California against the California Supreme Court and that Court's Justices challenging the constitutionality of the California rule that limits pro hac vice admission to nonresidents licensed in other states. In dismissing Giannini's complaint, the District Court held that the rule did not violate the Free Speech Clause of Association Clause of the First Amendment, did not deny plaintiffs meaningful access to the Courts, was supported by a rational basis, and did not violate the Privilege and Immunities Clauses of Article Iv or the Fourteenth Amendment or the Commerce Clause. See Paciulian v. George, 38 F. Supp. 2d 1128 (N.D. Cal. 1999) aff'd 229 F.3d 1226 (9th Cir. 2000). The District Court further held that the action was filed for an improper purpose, warranting Rule 11 sanctions, and enjoined Giannini from filing future suits regarding admission to the bar and regulation of the practice of

law in California without leave of court. Id. In affirming the District Court, the Ninth Circuit Court of Appeals further held that plaintiffs did not have a protectable property interest in gaining pro hac vice status. Id.

Undeterred, Giannini filed another action in the Northern District of California against the Judges of the Northern District of California and the members of the Ninth Circuit Judicial Council contending that the Criminal Justice Act Plan's requirement that an applicant for membership on the District Court's indigent defense panel be a member of the California bar violated a variety of plaintiff s constitutional rights. See Russell v. Hug, No. 99-1104, 1999 WL 592195 (N.D. Cal. Aug. 3, 1999) aff'd 275 F.3d 812 (9th Cir. 2002). In dismissing Giannini's complaint, the District Court concluded that the state bar membership requirement does not arbitrarily discriminate against attorneys who do not pass the California bar, does not violate the principles of right and justice, does not violate Title VII, does not implicate or violate 28 U.S.C. §§ 2071-72, does not violate Executive Order 11478, does not violate the Free Speech or Associate Clauses of the First Amendment, is rationally related to a legitimate government interest, and does not violate the Due Process Clause. Id. In affirming the District Court, the Ninth Circuit Court of Appeals further held that the membership requirement is not a "rule" within the meaning of the statute governing rule-making power of federal courts, is not inconsistent with certain requirements under the statute setting forth requirements for counsel in federal death penalty cases, was not subject to notice and comment requirements of the statute governing orders of circuit judicial councils, does not violate Fifth Amendment's Equal Protection

Clause, does not violate either Article IV's or the Fourteenth Amendment's Privileges and Immunities Clauses, and does not infringe on plaintiff's First Amendment rights to speech, association, or petition in a public forum. Id.

Having failed in the District Courts of California and the Court of Appeals for the Ninth Circuit, Giannini attempts to retry the same issues here. His complaint will be dismissed for substantially the same reasons stated by those Courts. Plaintiffs' complaint is dismissed for the following preliminary reasons: (1) plaintiffs have failed to demonstrate how I have personal jurisdiction over many of the named defendants; (2) plaintiffs' pleadings do not comply with Federal Rule of Civil Procedure 8's "short and plain statement" requirement; and (3) plaintiffs have not complied properly with my Order of January 24, 2006 directing plaintiff to "address the questions whether I have jurisdiction to set aside the Local Rules of other Districts and why each defendant is a proper defendant in this case."

Plaintiffs' claims are also dismissed on the merits. Count I (Rules Enabling Act) is dismissed because the challenged local rules do not violate of 28 U.S.C. §§ 2071-72 & 332(4)(4) and are not inconsistent with Federal Rule of Civil Procedure 82, Federal Rule of Appellate Procedure 46, Supreme Court Rule 5, or 5 U.S.C. § 500(b). See Russell, 1999 WL 592195, at *5 aff'd 275 F.3d at 817-19; Giannini, 711 F. Supp. at 999 aff'd 911 F.2d at 360; Matter of Roberts, 682 F.2d 105,109 (3d Cir.1982). Similarly, Count IV (Article VI Supremacy Clause) is dismissed because the challenged local rules are creatures of federal, not

state, law and, thus, cannot conflict with or contradict federal law.

Counts II, III, VII, VIII, IX, and X (First Amendment freedoms of speech, association, and right to petition for redress of grievances) are dismissed because there is nothing in the challenged local rules that prevents plaintiffs from exercising their right to express themselves in any forum, associating together in any forum, petitioning for redress of perceived grievances in this suit, or appearing pro se in any forum. See Frazier v. Heebe, 482 U.S. 641, 645 (1987); Sup . Ct. of N.H. v. Piper, 470 U.S. 274, 283 n.16 (1985); Leis v. Flynt, 439 U.S. 438, 442 (1979). Moreover, because there is no general federal procedure for certifying the fitness of an attorney's ability to practice lawin the federal courts, it is rational for a district court to rely upon admission to the bar of the state in which it sits to determine such fitness. See Russell, 1999 WL 592195, at *7 aff'd 275 F.3d at 822-23; Paciulian, 38 F. Supp. 2d at 1137 aff'd 229 F.3d at 1230.

Count V (Privileges and Immunities Clause - comity) is dismissed because the Privileges and Immunities Clause is merely a limitation on the power of states to discriminate against nonresidents and does not implicate the ability of a federal court to make rules of practice and procedure. See Sup. Ct. of Va. v. Friedman, 487 U.S. 59, 65 (1988); Russell, 275 F.3d at 821; Paciulian, 38 F. Supp. 2d at 1142 aff'd 229 F.3d at 1229; Giannini, 911 F.2d at 357; Hawes v. Club Ecuestre El Comandante, 535 F.2d 140,145 (1 st Cir.1976); Manard, 701 F Supp. at 740-41. The challenged local rules likewise do not violate the Full

Faith and Credit Clause of Article IV because admission to one jurisdiction's bar does not confer the right to practice law in any other jurisdiction. See Leis, 439 U.S. at 443; Giannini, 711 F. Supp. at 1000 aff'd 911 F.2d at 360; Lark v. West, 182 F. Supp. 794, 796 (D.D.C.1960). Count VI (Privileges and Immunities Clause - right to travel) is also dismissed because the challenged local rules do not discriminate against nonresidents and this Clause applies only to state, not federal, restrictions. See Russell, 275 F.3d at 822; Paciulian, 229 F.3d at 1229; Hawkins v. Moss, 503 F.2d 1171,1178-79 (4th Cir.1974); Giannini, 711 F. Supp. at 1000.

Count XI (Sixth Amendment - right to counsel) is dismissed because there is no absolute right to counsel of one's choice. See Davis v. Stamler, 650 F.2d 477, 479-80 (1981) ("The sixth amendment does provide some protection for a criminal defendant's decision to select a particular attorney. The defendant must have a "fair opportunity" to secure counsel of his choice and "arbitrary dismissal" of the attorney chosen by the defendant is prohibited. It is clear, however, that the sixth amendment protection accorded to the defendant's choice of counsel must be balanced against the requirements of the fair and proper administration of justice, including the interests underlying the ethical standards governing the practice of law.") (internal citations omitted).

Counts XII and XIII (Fifth Amendment Equal Protection and Due Process Clauses) are dismissed because there is no fundamental right to practice law and the challenged local rules do not discriminate against a suspect, or even quasi-suspect, class and are

rationally related to a district court's legitimate interest in determining an applicant's fitness to practice law before the court. See Heller v. Doe, 509 U.S. 312, 319 (1993); Leis, 439 U.S. at 443; Schware v. Bd. of Bar Examiners, 353 U.S. 232, 239 (1957); Russell, 1999 WL 592195, at *7-8 aff'd 275 F.3d at 819-20; Paciulian, 38 F. Supp. 2d at 1139-41 aff'd 229 F.3d at 1230; Giannini, 711 F. Supp. at 999-1000 aff'd 911 F.2d at 357-58; Sestric v. Clark, 765 F.2d 655, 664 (7th Cir.1985); Maynard, 701 F. Supp. at 742-43; Lark, 182 F. Supp. at 796. Moreover, the challenged local rules cannot be considered to violate the Fifth Amendment's Takings Clause because admission to practice law in a particular jurisdiction does not confer a property right to practice in other jurisdictions. See Giannini, 911 F.2d at 359; Matter of Roberts, 682 F.2d at 107.

AND NOW, this 23rd day of March 2006, upon consideration of plaintiffs' complaint seeking declarative and injunctive relief, plaintiffs' motion for preliminary injunction, plaintiffs' amended complaint asserting class action status, defendants' opposition to plaintiffs' motion for preliminary and permanent injunctions and motion to dismiss, plaintiffs' supplemental argument with respect to the Sixth Amendment right to counsel, plaintiffs' reply, and plaintiffs' amended reply, and for the reasons set forth above, it is ORDERED as follows:

1. Plaintiffs' motion for preliminary and permanent injunctions is DENIED;

2. Defendants' motion to dismiss is GRANTED and plaintiffs' complaint is DISMISSED with respect

to all claims;

3. Plaintiffs and plaintiffs' counsel are enjoined from filing any further papers with respect to the constitutionality of any jurisdiction's local rules of admission, practice, or procedure in the Eastern District of Pennsylvania without prior leave of Court. Leave of Court shall be forthcoming upon plaintiffs' or plaintiffs' counsel's demonstration through a properly filed petition that the proposed filing: (1) can survive a challenge under Federal Rule of Civil Procedure 12; (2) is not barred byprinciples of claim or issue preclusion; (3) is not repetitive or violative of this Court's order; and (4) is in compliance with Federal Rule of Civil Procedure 11;

4. Plaintiffs or plaintiffs' counsel shall attach a copy of this Order and Injunction to any such petition for leave of Court;

5. The Clerk of Court shall refuse to accept any submissions for filing from plaintiffs or plaintiffs' counsel relating to the subject matter of this action except petitions for leave of Court, unless such submissions for filing are accompanied by an order of this Court granting leave. In the event that plaintiffs or plaintiffs' counsel succeed in filing papers in violation of this Order, upon such notice, the Clerk of Court shall, under authority of this Court's Order, immediately and summarily strike the pleadings or filings.

s/ Thomas N. O'Neill, Jr.
THOMAS N. O' NEILL, JR, J.

Footnotes

fn1The Honorable John W. Bissell, Dennis M. Cavanaugh, Joseph A. Greenway, Jr., Katherine S. Hayden, Faith S. Hohchberg, Jose L. Linares, William J. Martini, Joel A. Pisano, and Alfred W. Wolfin.

fn2 The Honorable Consuelo B. Marshall, Percy Anderson, Terry J. Hatter, Ronald S.W. Lew, Nora M. Manella, Howard A. Matz, James S. Otero, Dean D. Pregerson, George P. Schiavelli, Christina A. Snyder, John F. Walter, and Steven v. Wilson.

fn3The Honorable Mary M. Schroeder, Arthur Alarcon, Alex Kozinski, Kim McLane Wardlaw, Marsha Berzon, Andrew J. Kleinfield, B. Lynn Winmill, Stephen N. McNamee, Terry J. Hatter, Charles R. Breyer, Roger G. Strand.

fn4The Honorable Anthony J. Scirica, Dolores K. Sloviter, Jane R. Roth, Theodore A. McKee, Marjorie O. Rendell, James T. Giles, Thomas Vaniske, Sue L. Robinson, Doretta W. Ambrose, and Garret Brown, Jr.

fn5 The Honorable Douglas B. Ginsburg, David B. Sentelle, Karen Lecraft Henderson, A. Raymond Randolph, Judith W. Rogers, David S. Tatel, Merrick B. Garland, Thomas F. Hogan, Emmet G. Sullivan, James Robertson, Richard W. Roberts, Ellen Segal Huvelle, and Reggie B. Walton.

fn6See also McKenzie v. Rehnquist, 203 F.3d 52 (D.C. Cir.1999) (unpublished) (affirming dismissal of Giannini's challenges to the local rules in the California district courts and holding that Giannini lacked

standing to challenge the local rules in other states because he failed to allege an actual injury); Morissette v. Yu, 21 F.3d 1114 (9th Cir.1994) (unpublished) (affirming dismissal of Giannini's complaint because his general attacks on the constitutionality of the form and content of the California bar examination are res judicata and upholding the district court's sanctions against Giannini for bringing a frivolous motion and making scandalous allegations based upon details from his dream); Mavnard v. U.S. Dist. Ct. for the C.D. Cal., 701 F. Supp. 738 (C.D. Cal. 1988) aff'd 951 F.2d 1581 (9th Cir.1990) (unpublished) (dismissing attorney's suit challenging constitutionality of local rule of Central District of California limiting admission to its bar to members of the California state bar because Article IV's Privileges and Immunities Clause, Commerce Clause, and the Fifth and Fourteenth Amendments were inapplicable and the rule was rationally related to a legitimate governmental interest).

CONSTITUTIONAL PROVISIONS

Amendment I. Religious and political freedom.

Congress shall make no law ... abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment V. Criminal actions — Provisions concerning — Due process of law and just compensation.

No person shall ... be deprived of life, liberty, or property, without due process of law;

UNITED STATES STATUTES

5 § 500. Administrative practice; general provisions

(a) For the purpose of this section—
(1) "agency" has the meaning given it by section 551 of this title; and
(2) "State" means a State, a territory or possession of the United States including a Commonwealth, or the District of Columbia.
(b) An individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts.

28 U.S.C. § 332. Judicial Councils of Circuits.

(d) (4) Each judicial council shall periodically review the rules which are prescribed under section 2071 of this title by district courts within its circuit for consistency with rules prescribed under section 2072 of this title. Each council may modify or abrogate any such rule found.

28 U.S.C. § 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

...

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

...

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection

(b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

28 U.S.C. § 1654. Appearance personally or by counsel

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

28 U.S.C. § 2071. Rule-Making Power Generally.

(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

(b) Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment. Such rule shall take effect upon the date specified by the prescribing court and shall have such effect on pending proceedings as the prescribing court may order.

(c)(1) A rule of a district court prescribed under subsection (a) shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit.

(2) Any other rule prescribed by a court other than the

Supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference.

(d) Copies of rules prescribed under subsection (a) by a district court shall be furnished to the judicial council, and copies of all rules prescribed by a court other than the Supreme Court under subsection (a) shall be furnished to the Director of the Administrative Office of the United States Courts and made available to the public.

(e) If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment.

(f) No rule may be prescribed by a district court other than under this section.

28 U.S.C. § 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

28 U.S.C. § 2075. Bankruptcy Rules.

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11.

Such rules shall not abridge, enlarge, or modify any substantive right.

28 U.S.C. § 2077. Publication of rules; advisory committees

(b) Each court, except the Supreme Court, that is authorized to prescribe rules of the conduct of such court's business under section 2071 of this title shall appoint an advisory committee for the study of the rules of practice and internal operating procedures of such court and, in the case of an advisory committee appointed by a court of appeals, of the rules of the judicial council of the circuit. The advisory committee shall make recommendations to the court concerning such rules and procedures. Members of the committee shall serve without compensation, but the Director may pay travel and transportation expenses in accordance with section 5703 of title 5.

FRAP RULE 46. Attorneys

(a) Admission to the Bar.

(1) **Eligibility.** An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United

States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).

Civil Action No.
05-cv- 5081 TON
CLASS ACTION

UNITED STATES DISTRICT COURT FOR FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NAAMJP (National Association for the Advancement of Multijurisdiction Practice), John F. O'Rourke, Alan Ellis, Donald Harris.

Plaintiffs,

v.

Alberto R. Gonzales, et. al

PLAINTIFFS' EXHIBIT LIST

Exhibit A John F. O' Rourke,

1. Certificate of Good Standing
2. Declaration
3. CV

Exhibit B Amended Allan Ellis

1. Declaration
2. Certificate of Good Standing
3. CV

Exhibit C Donald Harris

1. Certificate of Good Standing
2. Declaration
3. CV

Exhibit D Kenneth Owen

1. Declaration

Exhibit E

1. Conference of Chief Justices Adoption of ABA MJP Recommendations

2. ABA MJP Adoption of Model Rule for Admission on Motion

3. ABA 1995 Adoption of Recommendation 8A Calling for Elimination of State Bar Membership Requirements for Practice Before U.S. District Courts

Exhibit F

RAND Corporation Reports–Showing California Entirely Subjective Bar Exam Given to Experienced Attorneys is Less Reliable Than Flipping a Coin

Exhibit G Declaration of Marvin Comisky

Exhibit H Declaration of David B. Fawcett

Exhibit I – Philadelphia County Bar Association Ethics Opinion 2005-14 (August 2005). This opinion, in sum, raises the question whether a lawyer licensed in Russia, who also received an LLM from an approved ABA accredited law school who passed the bar exam in another state, and who is admitted to practice before the Immigration and Naturalization Court, and who is, however, presently ineligible to sit for the Pennsylvania bar exam or waive into the Pennsylvania bar on admission by motion, can ethically open an office in Pennsylvania for the limited practice before Immigration and Naturalization Court. The opinion holds the lawyer is authorized to open an office in Pennsylvania under the Model Rules of Professional Conduct, Rule 5.5 "Multijuridictional Practice of Law" for practice before Immigration and Naturalization Court.

Exhibit J – Proof of Irreparable Injury Caused by Constitutional Inadequate Access to Court and Counsel. The Daily Journal on January 13, 2005 reports, in sum, that presiding judge William MacLaughlin of Los Angeles Superior Court stated that of the 2.7 million cases heard last year in the Los Angeles Superior Court system, 2 million featured at least one

party acting as his or her own counsel. Presiding Judge MacLaughlin said the chief factor likely is economic, "The cost of legal services has grown and grown, and it seems that fewer and fewer people are able to afford legal services." Judge MacLaughlin reports it was "hugely frustrating" for judges because many pro-per litigants come without the right forms or with forms filled out incorrectly.

Exhibit K – Proof of Irreparable Nationwide Injury Caused by Inadequate Access to Court and Counsel. The Legal Aid Services in a national study titled "Documenting the Justice Gap in America," reports that legal aid cannot meet the needs of 80% of the people that it serves.

Exhibit L – Proof Lawyers Cannot Justify Monopoly Licensing Protection, and this Licensing Protection Results in Inflated Salaries that Injures the Public By Driving Up the Cost of Legal Services. The Daily Journal reports, based on public admissions that starting salaries for first year associates at national law firms are $125,000 to $135,000, and partner profits are in excess of $1,000,000 per year.

Exhibit M –Stanford Law Dean Fails California bar exam for experienced attorneys. Attached Wall Street Journal article dated December 5, 2005 reporting: (i) that Stanford Law Dean Kathleen Sullivan was recently failed on the California bar exam for attorneys; (ii) Dean Sullivan is the author of a well known case book on constitutional law; (iii) the California bar exam pass percentage for experienced attorneys on the test Kathleen Sullivan allegedly failed was 28%; (v) Kathleen Sullivan's partner stated, "If anyone should have passed it is Ms. Sullivan. The problem is not with Kathleen Sullivan, it is with the person who drafted the exam or the person who graded it."

Exhibit N –Bombay, India Native Who Never Attends Law School Passes California Bar Exam.

Exhibit O – SCIENTIFIC TESTS DEMONSTRATE EXPERTS AND NOVICES ARE MORE QUALIFIED TO JUDGE COMPETENCE THAN LICENSING OFFICIALS. Attached is Klein, Sources of Power (The MIT Press 1999) *Chapter 10 The Power to See the Invisible, supra,* "Example 10.1 The Instructors Who Couldn't Save Their Own Lives."

Dr. Klein demonstrates controlled tests established:

(i) nine out of ten experts were able to spot another experienced expert;

(ii) five out of ten novices who finished an eight hour course were able to spot an experienced expert; and

(iii) only three out of ten instructors (licensing officials) who taught the novices, but who never actually practiced, were able to spot an experienced expert.

Exhibit O by analogy explains why a Bombay India native who never went to law school can be judged competent on the California bar exam by those who have never practiced (See Exhibit N), and why the Dean of Stanford Law School can be judged incompetent by those who have never practiced. See Exhibit M.

Exhibit O proof of the blind leading the blind correlates (almost 100%) with Exhibit D — the Rand Corporation studies that admit, beyond any doubt, the eight-question entirely subjective test given to experienced attorneys is less than .48% reliable.

Exhibit P – CLIENT REPRESENTATION IN THE 21st CENTURY (Report of the American Bar Association Multijurisdiction Practice Commission)

Exhibit Q– United States Department of Justice Backs Split of Ninth Circuit; United States House of Representatives Scolds Ninth Circuit; Size Mattered In Fiery Partisan Debate About Ninth Circuit.

Exhibit R– Plaintiffs' Summary of Key Points from "A National Action Plan on Lawyer Conduct and Professionalism" (Adopted by the Conference of Chief Justices January 21, 1999).

First, the Conference of Chief Justices in the "**Introduction**" states: "(T)he vast majority of lawyers in this country are competent professionals. They are conscientious advocates of their clients' interests, honest in their representations to courts and to opposing counsel, civil to their legal colleagues, and generous contributors of their time and expertise to their communities. In short, they conduct themselves according to the highest dictates of the legal profession. (Page 1)

Second, the Conference of Chief Justices as to "**Bar Examinations**" states: "The subject areas tested on the examination for admittance to the state bar should reflect a focus on fundamental competence by new lawyers.

Comment

State bar examinations traditionally test bar applicants' knowledge of substantive legal principles, but rarely require more than a superficial demonstration of the applicants' understanding of legal ethics, professionalism, or basic practical skills.** Thus, they fail to provide an effective measure of basic competence of new lawyers. The format of the bar examination should be modified to increase the emphasis on the applicants' knowledge of applied practical skills, including office management skills. Performance testing methods should be used to

evaluate applicants' writing, research, and organizational skills. An essay question format is preferred over a multiple choice format for testing ethics and professional responsibility. Essay questions should incorporate issues related to legal ethics and professionalism, including the consequences of unprofessional, unethical, and incompetent practice habits.

A passing score on the bar examination should be an indicator of basic competency to practice law. Scoring of the bar examination should be consistent within the jurisdiction. To the extent that interstate coordination is practical, the scoring should be consistent with neighboring jurisdictions. (Page 15)

Third, the Conference of Chief Justices as to "Interstate Cooperation" states:

"The appellate courts of highest jurisdiction should cooperate to ensure consistency among jurisdictions concerning lawyer regulation and professionalism and to pool resources as appropriate to fulfill their responsibilities. Specific efforts of interstate cooperation include:

- Continued reporting of public sanctions to ABA National Regulatory Data Bank;
- Using the Westlaw Private File of the ABA National Regulatory Databank;
- Inquiring on the state's annual registration statement about licensure and public discipline in other jurisdictions;
- Providing reciprocal recognition of CLE;
- Establishing regional professionalism programs and efforts;
- Recognizing and implementing the International Standard Lawyer Numbering System created by Martindale-Hubbell and the American Bar

Association to improve reciprocal disciplinary enforcement; and

- Providing information about bar admission and admission on motion (including reciprocity) on the bar's website.

Comment

Successful efforts to improve lawyer conduct and professionalism require a national commitment. Legal practice in multiple jurisdictions increasingly is the rule rather than the exception, particularly given improvements in communication and transportation technology. The appellate courts of highest jurisdiction should not only provide leadership and coordination of professionalism and legal ethics programs within their own states, but also should encourage interstate cooperation, including pooled resources. (Page 34)

Exhibit S "A National Action Plan on Lawyer Conduct and Professionalism" (Adopted by the Conference of Chief Justices January 21, 1999). (Full Report).

Exhibit T– "Chart VIII Admission on Motion" Comprehensive Guide to Bar Admission Requirements (National Conference of Bar Examiners and American Bar Association Section on Legal Education and Admission to the Bar 2005).

Chart VIII establishes 34 States (including the District of Columbia) have adopted admission on motion without any further testing. Additionally, since Chart VIII was published the State of Kansas has adopted admission on motion for experienced attorneys.

Exhibit U– National Conference of Bar Examiners Admission on Motion Statistics — 27,255 attorneys admitted to another State's Bar on Motion in between 1999-2004

These public records also reveal that 702

attorneys were admitted to the bar of the Pennsylvania Supreme Court, and thus were categorically eligible for *general* admission on motion to the bar of the Eastern District of Pennsylvania without taking any additional bar examination.

Additionally, these 27,255 "mainstream" attorneys admitted on motion to the States were categorically ineligible for *general* admission privileges to the bar regardless of individual merit under the extremist" "local" rules of the United States District Courts for the Districts of New Jersey and California.

Exhibit V – Foreign Legal Consultant Licensing Rules Have Been Adopted by 26 States, American Bar Association Center for Professional Responsibility Joint Committee on Lawyer Regulation (September 20, 2005). Thus, foreign lawyers in 26 states have been certified as privileged to practice foreign law: While Plaintiff American citizen federal practice specialists are categorically ineligible regardless of individual merit for certification and general admission privileges to the United States District Courts under the challenged "local" (sic) rules.

Exhibit W– Kenneth Owen Supplemental Declaration of Injury

Exhibit X– PLAINTIFFS' NOTICE AND REQUEST FOR A FRCP 26(f) CONFERENCE dated November 30, 2006: To which defense counsel has refused to cooperate with.

Exhibit Y– PLAINTIFFS' Interrogatories (First Set), Requests for Admission, and Notice of Deposition to Alberto R. Gonzales dated December 9, 2006 ignored by defense counsel.

Dated: January 31, 2006

Respectfully submitted,

By: /s/ Joseph Robert Giannini
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Supreme Court of Pennsylvania
CERTIFICATE OF GOOD STANDING
John F. O'Rourke, Esq.

DATE OF ADMISSION
June 16, 1993

The above named attorney was duly admitted to the bar of the Commonwealth of Pennsylvania, and is now a qualified member in good standing.

Witness my hand and official seal
Dated: September 2, 2005
Patricia A. Nicola
Chief Clerk

DECLARATION OF JOHN F. O'ROURKE

I, JOHN F. O'ROURKE, am competent to testify and have personal knowledge and being duly sworn, depose and state the following in support of the complaint NAAMJP v. Bush and the relief requested therein:

1. I am a name plaintiff in this action, and bring this action both as a member of the NAAMJP, and as an individual.

2. I am an Attorney-at-Law, admitted to practice before the Supreme Court of Pennsylvania, on June 16, 1993. Attached hereto is a Certificate of Good Standing, obtained from the Prothonotary of the Supreme Court of Pennsylvania and dated; also attached is an abbreviated copy of my Curriculum Vita, summarizing my education, employment, bar admissions, technical associations, award, and selected publications. 3.

3. I was admitted on October 16, 1995, as an Attorney-at-Law at the Bar of the Court of Appeals for the District of Columbia.

4. I also am a member of the Federal Bar, being admitted to practice before the United States District Court of the Western District of Pennsylvania on May 27, 1993; before the United States Court of Appeals for the Third Circuit on November 25, 1994; the United States Court of Appeals for the Federal Circuit on January 31, 1995; and the United States Court of Appeals for the Ninth Circuit in 2005.

5. Further, I am registered to practice before the United States Patent and Trademark Office, admitted

on May 8, 1995.

6. I earned a Juris Doctor (JD) from the Temple University School of Law (now Beasley School of Law), Philadelphia, Pennsylvania, in January 1993.

7. Prior to practicing law, I earned a Bachelor's in Electrical Engineering (BEE) and a Masters of Science in Electrical Engineering (MSEE) from the Villanova University College of Engineering, Villanova, Pennsylvania, in May 1984 and May 1989, respectively.

8. Furthermore, I am a Registered Professional Nurse, currently licensed to practice in both Pennsylvania and New Jersey; I earned an Associate in Science, Nursing, at the Atlantic Community College (now Atlantic Cape Community College), Mays Landing, New Jersey, in June 1977.

9. I currently practice as a Registered Patent Attorney in Orange County, California; however, I am not admitted to the California Bar. I am Constitutionally authorized to practice law under the Sperry Doctrine of federal preemption under the Supremacy Clause, which Doctrine, simply put, forbids any State from infringing upon my right to practice in a substantive area of law that is exclusively federal in nature. The Sperry Doctrine was first enunciated in SPERRY v. FLORIDA EX REL. FLORIDA BAR, 373 U.S. 379 (1963).

10. In virtually every jurisdiction, local rulemaking groups facilitate federal Constitutional objectives by formulating administrative rules of court. These rules are made at the request of a local Article III judge or

judicial council. Such rules of court may include specific provisions regulating persons seeking admission to the bar of the respective local federal district court. In general, I neither oppose nor claim harm from local rules aimed to facilitate federal Constitutional objectives, which are applied with a reasonable degree of uniformity among all of the federal districts.

11. My harm, in short, arises from the lack of uniformity and unjustifiable disparities in qualifications for admission to practice in a substantive area of exclusively federal law, as those diverse qualifications are expressed among the local rules of the ninety-four (94) federal district courts of the thirteen (13) Federal judicial Circuits.

12. I have sustained concrete injuries to my professional practice and career, and to my personal life, as a direct result of the patchwork of local rules among districts of the federal courts.

13. These aforementioned injuries impose an actual, ongoing harm that exists presently and in the past. The effect of these injuries is cumulative.

14. In addition to suffering actual, direct, and personal injuries, the local rule patchwork creates a milieu of diminishment, in which I will inevitably suffer continued actual, direct, and personal injuries.

15. By "milieu of diminishment," I mean that the patchwork of local rules in the federal judiciary, such as in the four local Districts of California, creates a negative and hostile professional working environment, essentially nationwide in scope, in which I am branded

with second-class status - as something less than a "real attorney" - and am prevented from representing clients in federal courts, de jure, in California, and, de facto, in other jurisdictions as a result of my diminished status in California, as perceived by other California practitioners.

16. In jurisdictions such as the four federal district courts of California, local rulemaking is undertaken by a rulemaking body at the request of a local Article III judge, or judicial council groups. This group, drawn from local members of the State bar, formulates self-serving rules barring admission to any attorney deemed, in an idiosyncratic manner, to be unworthy of admission to the local federal bar.

17. Under the local rules of the District Courts of California', an attorney may routinely represent clients before these federal courts o if that attorney is admitted to the California Bar, even if that attorney practices in an area of law that is exclusively federal in nature, is preemptive of State laws, and is not amenable to regulation or control by the State Bar, except as otherwise allowed by federal law.

18. Under the local rules of the District Courts of Californiafn2, any attorney who lives or works in California is barred from making pro hoc vice appearances before these federal courts. Again, such restrictions are wrongly applied against practitioners of federal law in California, even if that attorney practices in an area of law that is exclusively federal in nature, is preemptive of State laws, and is not amenable to regulation or control by the State Bar, except as otherwise allowed by federal law.

19. As a direct and immediate result of the local rules of the four federal district courts in California, I am unable to make an "appearance before the Court on behalf of another party or a class" on any, exclusively federal, patent or copyright matter, in any of these courts, merely because of my place of residence, namely, California.

20. Ironically, although any client seeking my services in California would necessarily be turned away, I could represent the same clients on the same matters, exclusively federal in nature, in the federal district courts of other locations within the Ninth Circuit, including Alaska, Arizona, Hawai'i, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington.fn3 The practical impact is not merely "chilling," it eliminates me from consideration, regardless of my technical and patent knowledge and experience.

21. Likewise, in other federal district courts having idiosyncratic restrictive local rules for admission, a client seeking my representation in that forum would be denied my counsel on an exclusively federal patent or copyright matter, merely because the local bar, by way of the local district court rules, imposes an arbitrary barrier to practice on a federal practitioner. Thus, these local rules deny clients the right to seek the most qualified counsel to represent them in federal district court on a federally-preempted matter of law.

22. Many attorneys, who practice in esoteric areas of federal law, like me, have multi-professional backgrounds enriched though many years of diverse education and professional experience in specialized

extralegal areas. Moreover, by undertaking the study of specialized areas of law, such a practitioner brings a depth and breadth of knowledge to the client that is unrivalled by others of more pedestrian training, despite the best efforts of the ordinary practitioner. These attorneys meld their expertise in one or more arcane extralegal disciplines with a body of specialized legal skills, directing the concerted whole to their client's relief. In many cases, such an attorney may be one of the few to speak a client's specialized language and terms of art, to fully appreciate the client's needs, and to translate those needs into the court of a federal district court. To deny clients the services of such experts merely on arbitrary grounds is unfathomable.

23. I bring to the Court first-hand knowledge of such an extra-legal background. My extra-legal background incorporates the electronic, communications, and computer arts, the life sciences and healing arts; and the physical sciences, including nuclear and reactor physics, and mechanical engineering. Although there are numerous others dispersed across the nation, whose qualifications would dwarf mine, I respectfully submit the following summary of my life's work.

24. For nearly twenty (20) years prior to undertaking the study of law, I studied and worked in three disparate scientific disciplines - nuclear operations, nursing, and electrical engineering - from which I cultivated a uniquely broad and deep base of theoretical and empirical knowledge and skills. I actively expand and update this knowledge base, to keep it relevant to the evolving needs of scientific and technical clients seeking protection for their intellectual property.

25. In 1969, I enlisted in the United States Navy. After

basic training, I received 18 months of intensive training in ship's propulsion and auxiliary systems; mechanical, electrical, and chemical sciences; nuclear physics; nuclear reactor theory and operating principles; and actual nuclear reactor and primary systems operations. I applied that knowledge and developed key skills as a Nuclear Reactor Mechanical Operator, on the aircraft carriers, the U.S.S. Enterprise, and the U.S.S. Nimitz. Due to injuries received aboard the U.S.S. Enterprise in the South China Sea off the coast of North Vietnam, I received an Honorable Discharge under Medical Reasons in 1974. As a result, I am classified by the United States Department of Veteran's Affairs as a disabled Vietnam veteran, having a rated, line-of-duty, service-connected disability.

26. Not realizing the long-term effects of those injuries, I studied nursing at Atlantic Community College (now Atlantic Cape Community College), in Mays Landing, NJ. There I learned the technical aspects of the human animal and its environment - chemistry, anatomy, physiology, microbiology, and many hours of clinical study followed by supervised clinical practice. In 1977, I earned an Associate's Degree in Nursing and, successfully completing the licensure examination, I began practice as a Registered Nurse in New jersey in 1977. Later, in 1979, I was admitted to practice in Pennsylvania, becoming a Research Nurse Specialist at the Children's Hospital of Philadelphia. There I was involved in many advanced studies involving endocrinology, metabolism, cardiology, oncology, infectious diseases, and the like. As much as I enjoyed being a Nurse, my military injuries (both knees) made this practice setting very difficult. I opted to attempt

Electrical Engineering because of the emphasis of cerebral efforts over physical labor.

27. My career transition from the physically-demanding clinical practice of a Registered Nurse to the intellectually-demanding undertakings of an Electrical Engineer was under the aegis of the Veteran's Administration Vocational Rehabilitation Program. As the years pass, the daily impact of this disability on routine physical activities of
daily life become increasingly apparent; and my dependency upon my intellectual assets becomes more absolute.

28. In 1984, I earned a Bachelor's in Electrical Engineering and in 1989, a Master's in Electrical Engineering from Villanova University. In the interim, I worked in the semiconductor industry as an engineer for Intel Corporation; and in telecommunications engineering in the first public switched-packet network for GTETelenet. By 1989, it became clear that the Philadelphia economy offered a brutal future for engineers, so I evolved a plan to focus my prior knowledge and skills in a burgeoning area of law - patents.

29. In 1991 and 1992, I clerked as a Summer Associate at the law firm of Buchanan Ingersoll, P.C., headquartered in Pittsburgh, Pennsylvania, for the sole purpose of becoming a patent attorney. Although I attended law school in Philadelphia, and lived with my wife and young son in the Philadelphia suburbs, I followed the advice of seasoned patent attorneys in Philadelphia and seized the rare opportunity offered by Buchanan Ingersoll to learn the arcane, but richly

developed, legal arts of patent claim drafting, patent preparation, and patent prosecution.

30. In 1993, upon graduation from law school, I began practice as at Buchanan Ingersoll as an Associate Attorney in the Intellectual Property section, where I clerked in 1991 and 1992. While studying for the United States Patent and Trademark Office registration examination, I studied the complex body of law known as patent prosecution. However, my responsibilities also included supervised projects involving patent opinion drafting, patent litigation support, expert opinion analysis, trademark, copyright, trade secret, technology transfer and licensing, federal and state regulatory agency law, and a wide range of other supervised projects having a technical flavor.

31. Since 1993, I have been an Attorney-at-Law, who is an active, avid practitioner of intellectual property law, in both private and corporate practice, and have augmented my technical knowledge base with hard-won legal insights drawn from a dozen-plus years as a Patent Attorney/ advocate representing individual, entrepreneurial, corporate, and academic clients from across the United States and around the world.

32. Collectively, these clients develop, for example, electronics, networking and data communications, robotics, VLSI devices and manufacturing, terrestrial and satellite telecommunications, computer hardware and software components and systems, medical-surgical systems and devices, and energy and transportation systems.

33. Exemplary patent clients have included a sole

inventor with spare resources and a dream; a regional business emerging into a national presence; a US-based Fortune 100 corporation, protecting its geographically-dispersed US workforce by preserving its position in the global technical arena; and a foreign-based international conglomerate expanding operations into, and creating jobs within, multiple US States.

34. A common theme among the clients that I have services is that I am able to speak in their "tongue," whether a neurosurgeon, an Internet pioneer, a long-time telecommunications expert, a Ph.D. nuclear physicist, or a multitalented entrepreneur.

35. I also stood vigil, at drape's edge, in an Operating Room - as Patent Counsel - during a clinical trial of a surgical robot, evaluating which intellectual property was contributed by my client as part of a multi-organization, multi-disciplinary team, unaffected by the frank realities of the surgery, yet attuned to the distinctions made amid the confluence of medical, mechanical engineering, electrical engineering, software and computer engineering discussions that were abuzz among the many disciplines represented in the Operating Theatre. The senior orthopedic surgeon in the effort quipped that I was the only attorney that he would let into an operating room. Point well taken.

36. By about mid-1999, I reaffirmed my desire to continue the evolution of my legal career into that of a "full-service" Intellectual Property attorney, such as I began at Buchanan Ingersoll in 1991. To reach this goal, I resolved to gain the knowledge and the experience that would be needed to allow my legal practice to competently include a full range of services among the

domain of intellectual property law, with a special emphasis on patent procurement, management, licensing, enforcement, and defense. Although my litigation roles to that time were primarily supportive, I looked for opportunities, which would permit me to expand my experience in patent litigation, and to continue building upon my base of patent prosecution experience.

37. In 1999, I accepted an offer for such employment at a Southern California Intellectual Property Law boutique firm, which represented clients in a variety of the region's burgeoning technical industries. There, I continued to practice patent law, on the basis of registration with United States Patent and Trademark Office and admission as an Attorney in Pennsylvania (or the District of Columbia). The practice of law in this manner is protected under the Supremacy Clause of the United States Constitution, as decided in Sperry V. Florida Ex Rel. Florida Bar, 373 US 379 (1963).

38. Although I had been a member of the federal bar since May 1993, including the United States Courts of Appeals for the Third Circuit and for the Federal Circuit since 1994, I soon discovered that I would not be permitted to have meaningful involvement in federal patent litigation matters because the Local Rules for the four federal District Courts of California required that I first be admitted to the California Bar, irrespective of my membership in other state and federal bars. Over the next several years, the projects to which I was assigned were nearly exclusively patent preparation and prosecution, denying me the patent litigation experience that I sought to receive. I could not be brought onto patent and other federal litigation

projects without exception, I was told, because I was not admitted to the California Bar.

39. It is my observation that I am not considered for any federal litigation tasks, even in patents, regardless of where the case may lie. The longer 1 am unable to practice in California federal courts, the less likely that I will gain that experience elsewhere. Thus, I have first-hand knowledge of actual harm inflicted upon patent attorneys working in California, who are not admitted to the California Bar.

40. It also is my observation that the Local Rules of the affected federal district courts, such as those in California, create a de facto "Local Rules apartheid," which imposes irrational limitations on federal bar practice upon otherwise qualified members in good standing of the federal bar, including myself. The practical effect of the restrictive local rules, as is the case with the federal district courts in California, is to create a de facto, two-class federal bar.

41. The actual harm caused by the "Local Rules apartheid" is most plainly shown in daily practice. Subject to the Local Rules, Registered Patent Attorneys who are not admitted to the California Bar, such as I, may not routinely enter appearances to represent their clients on federal patent matters in the district courts of California. Similarly, these patent attorneys cannot make routine appearances in support of other Counsel, to apply their special technical and legal expertise on federal matters.

Moreover, admission to the California Bar itself may be irrelevant to gaining admission to an out-of-state

federal district court, where the idiosyncratic Local Rules of that outof-state federal district court likewise require state court admission, as does the Local Rules of the federal district courts of California.

42. Based on my personal observations and experiences during the period from September 1999 to the present, oppressive local rules, such as the local rules of the four California District Courts, limit professional development opportunities, substantially reduce opportunities for employment or client development, and create a class of second-tier federal practice attorneys whose dismissal may be easily justified during an economic downturn by their perceived lack of versatility. This is one stark, long-term example of the aforementioned "milieu of diminishment."

43. As the recent technical recession of 2000-2004 reached its nadir, I experienced first-hand the impact of the "Local Rules apartheid". In 2002, at the age of fifty-two and physically disabled, I was out of work and in a jurisdiction whose Local Rules prevented me from finding meaningful employment by applying my technical and patent prosecution expertise in a litigation setting, even if prosecution case work was sparse. The financial effects were catastrophic.

44. Thus, not only do these defective Local Rules create a subclass of "less versatile" federal attorneys, who are less desirable as employees or as future partners, these defective Local Rules twice-penalize the de facto attorney subclass by creating significant barriers to their re-employment - regardless of previous legal or technical experience. These barriers themselves do create circumstances which become barriers to being

admitted to the California Bar, leaving no way out.

45. During the period of 2002-2004, I aggressively sought re-employment by turning to executive recruiters, by responding to advertisements in print and electronic legal publications, and by making plain cold calls. I received only two responses out of over three hundred - both negative.

46. In a dramatic turn-about from 1999-2000, in 2002-2003, prospective California employers, both law firms and in corporations, demanded almost universally that, to be considered as a candidate for employment, a registered patent attorney be admitted to the California Bar.

47. Moreover, California Bar admission trumped other qualifications, including graduate degrees in a technical area of interest, or prior corporate patent practice experience. In rare, frank conversations with executive/legal recruiters regarding my state of affairs, my lack of admission to the California Bar - and being considered as "unavailable" for patent litigation projects - was the most significant barrier.

48. Because admission to the highest local state court is not a universal requirement for admission to the bar of a federal district court, it became all too apparent that these oppressive Local Rules impose an arbitrary barrier to practice for affected federal attorneys. Moreover, these Local Rules force clients needing counsel having specialized legal and technical expertise, to select from a smaller pool of potentially less-qualified professionals

49. I am currently employed again as a Registered Patent Attorney. However, the impairments, imposed by the oppressive federal district court Local Rules in all three Districts of California, remain. I cannot make appearances on behalf of clients, in exclusively federal matters, including in patent or copyright matters, before any of the federal District Courts of the Northern District, Eastern District, Central District, or Southern District of California. The infirmities of the California federal district court Local Rules notwithstanding, there are a number of other federal district courts in which I cannot make appearances on behalf of clients, in exclusively federal matters, including in patent or copyright matters, because the Local Rules for admission to the respective bars of those federal district courts are similar to the arbitrary restrictions imposed in California.

50. The absurdity of these challenged local rules is further evident because in some areas of federal practice I could be qualified as an expert witness under the Federal Rules of Civil Procedure, however, I am categorically barred from representing clients as counsel in litigation. Thus, I am qualified to be an expert witness on various intellectual property and scientific litigation cases but denied the right to act as counsel, while attorneys that are not admitted to the patent bar are eligible to serve as counsel in these intellectual property and scientific litigation cases.

51. It is a well know enormous advantage for a licensed doctor who is also a lawyer to serve as counsel in medical malpractice cases, both in settlement discussion and in litigation, whereas that parallel privilege is modified and abridged, and others with similar

credentials and experience, by the challenged local federal district court bar admission rules.

52. Until the local rule patchwork is abolished, I inevitably will suffer additional and very real injuries. Until those rules are eliminated, and federal bar practice is made uniform nationwide, I will face the same vulnerability and continue be tagged as "less versatile" solely due to these arbitrarily restrictive Local Rules. Unless the local rule patchwork is abolished by a favorable decision, I expect actual future injuries to my person and to my career to have a devastating effect both in the present and in the future.

Sworn to under penalty of perjury under the laws of the United States.

Dated: 10-24-2005

DECLARATION OF ALAN ELLIS

1. ALAN ELLIS, am competent to testify, and have personal knowledge, and if called as a witness would declare under oath the following in support of the complaint NAAMJP v. Bush and the relief requested therein:

2. I am a name plaintiff in this action, and bring this action both as a member of the NAAMJP and as an individual. I am herein incorporating by reference a true and correct copy of my Curriculum Vitae attached herewith.

3. I am a principal in the Law Offices of Alan Ellis. The Law Offices of Alan Ellis has a national practice and regional offices in San Francisco (San Rafael), California and Philadelphia (Ardmore), Pennsylvania. Our web site address is www.alanellis.com.

4. The Law Offices of Alan Ellis is a full-service sentencing, and postconviction law firm representing federal criminal defendants and inmates throughout the United States and abroad. Our practice area of federal criminal defense, of course, comes within the ambit of the 6th Amendment right to counsel, and includes:

- Appearing as criminal defense counsel in the federal district courts.
- Habeas corpus 2255 and 2241 petitions.
- Plea negotiations.
- Sentencing representation and consultation.
- Direct appeals in all circuits from conviction and sentence.
- Rule 35 motions.

- Supreme Court practice.
- Prison designation, transfers, disciplinary matters, and other problems.
- Parole representation.
- International prisoner transfer treaty work for foreign inmates and Americans arrested abroad.

4. Approximately one-third of our work comes to us from defense attorneys requesting our assistance on cases. Another third of our cases come to us from defendants, their family and friends wanting us to work with their attorneys. The remaining third come to us from defendants, inmates or their family and friends with requests for representation.

5. Most of the attorneys associated with the Law Offices of Alan Ellis have clerked for federal judges, and several have been law school professors. I was privileged to serve as law clerk for the Honorable Raymond J. Broderick, of the Eastern District of Pennsylvania, and the Honorable John W. Lord, Jr., Chief Judge, United States District Court for the Eastern District of Pennsylvania.

6. I graduated from Villanova University School of Law in 1967, and was the editor of the Villanova Law Review; and received the Constitutional Law Award.

7. I am a Former President of the National Association of Criminal Defense Lawyers (NACDL); a Former member of the Board of Directors of the National Council on Crime and Delinquency; Fellow of the American Board of Criminal Lawyers; and Past President of the ACLU of Central Pennsylvania.

8. I write a regular quarterly column on Federal Sentencing for the American Bar Association's Criminal Justice Magazine, I am the Publisher of "Federal Presentence and Post Conviction News" and the co-author of the Federal Prison Guidebook, the Federal Sentencing Guidebook and the Federal Post Conviction Guidebook.

9. While I am admitted to practice law before numerous federal district courts, courts of appeals, and the United States Supreme Court, the only state in which I am admitted to practice is Pennsylvania.

10. Because of my federal criminal practice and 3 5 years of experience in this specialty, I am regularly called upon to serve as counsel in the federal district courts and United States Courts of Appeals throughout the United States. The United States Court of Appeals for the Ninth Circuit has been kind enough to describe me as a "nationally recognized expert in federal criminal sentencing." United States v. Waiters, 309 F.3 rd 589 (ith Cir. 2002). In the Courts of Appeals, I apply for general admission once and for all, and this is the end of it. The same is not true for the district courts where I am often met by local rules that favor local attorneys.

11. I am injured in fact by the local rules of the United States District Courts that deny reciprocal general admission on motion to out-of-state attorneys. It would be either impossible or extraordinarily burdensome to conduct a national federal criminal defense practice, if the federal law specialist was required to be admitted in every single state in which there is a federal district court. The prohibitive cost in gaining admission in

every state would also far outweigh the benefit because State law has virtually nothing to do with my federal criminal practice specialty. The condition precedent of being first admitted in the forum state, in order to obtain general bar admission privileges in the United States District Court with that forum state, automatically makes it more costly to practice my federal national specialty both for me and my clients. This increased cost limits my ability as a federal practice expert to serve the public. This increased cost further interferes with the public's increased demand for specialized legal services. This increased cost further handicaps the justice process, as well as Courts themselves, because expert federal practice specialists because of their experience can make the Court's job easier.

12. This increased cost for general admission privileges further does not provide any corresponding benefit because my area of federal criminal practice is either superficially or not tested on any state's bar exam. This increase cost to obtain specialized federal legal services also does not protect the public from incompetent or unethical practitioners because the attorney is subject to the jurisdiction of the federal court for conduct occurring in the proceeding, and to reciprocal State and federal discipline and damages regardless of where the attorney practices.

13. The alternative of pro hac vice admission is a poor substitute for general admission. It is often merely discretionary

14. Pro hac vice admission drives up the costs of litigation, local counsel/ pro hac vice fee. There is also

no real benefit to either the public or the Court by granting pro hac vice admission, but not general admission, because the pro hac vice applicant must aver that he is familiar with the local rules and in good standing, as does the applicant for general bar admission. The pro hac vice applicant is also subject to reciprocal discipline.

15. I am particularly injured in fact by the local rules of the Central, Southern, and Eastern Districts of California because the Law Offices of Alan Ellis has a regional office in California. One out of 8 Americans lives in California. I am not admitted to the State Bar of California, and the State of California does not have an admission on motion provision. I am categorically ineligible far general admission privileges under the local rules of the federal district court because I am not a member of the California State.

16. In U.S. v. Waiters, 309 F.3d 589 (9th Cir. 2002), on behalf of the defendant, I applied for and was denied pro hac vice status under the local rules of the Southern District of California because I have an office in California. The local rules of the Central and Eastern Districts of California mirror the Southern District of California. Because I am not a member of the State Bar of California I am not eligible for general admission. Additionally, because I have an office in California I am categorically and mechanically disqualified from pro hac vice admission in these district courts. The Ninth Circuit held my client's constitutional right to counsel was abridged by this pro hac vice local rule, but this was harmless error. I was thus denied pro hac vice admission under the local rules which have not been changed or amended.

17. If these challenged local rules are invalidated, I will petition for general admission in the California federal district courts where I regularly appear. Once admitted in these federal district courts, I will be able to represent my potential clients and clients without delay and unjustifiable expense. This will save my clients, potential clients, and myself valuable time and money, and avoid the duplication of unnecessary work. This will also save valuable Court time and money because, whether r am appearing pro hac vice or generally, I will still be subject to the same Rules of Professional Rules of Conduct and reciprocal discipline.

Sworn to under penalty of perjury under the laws of the United States.
Dated: 1-6-06
Alan Ellis

Supreme Court of Pennsylvania
CERTIFICATE OF GOOD STANDING
Alan Ellis, Esq.

DATE OF ADMISSION January 8, 1968 The above named attorney was duly admitted to the bar of the Commonwealth of Pennsylvania, and is now a qualified member in good standing.

Witness my hand and official seal

Dated: August 24, 2005

John W. Person Jr.
Deputy Prothonotary

LAW OFFICES OF ALAN ELLIS

The firm's founder, Alan Ellis, is a nationally recognized authority in the fields of plea negotiations, sentencing, appeals, parole and prison matters, habeas corpus 2241 and 2255 petitions and international prisoner transfer treaties. For the past 35 years, he has successfully represented federal criminal defendants and prisoners throughout the United States and abroad. He is a sought-after lecturer in criminal law education programs for attorneys and is widely published in the areas of federal sentencing and post conviction remedies, with more than 85 articles to his credit.

Mr. Ellis is

- Former President of the National Association of Criminal Defense Lawyers (NACDL
- Former member of the Board of Directors of the National Council on Crime and Delinquency
- Fellow of the American Board of Criminal Lawyers
- Past President to the ACLU of Central Pennsylvania
- AV rated by Martindale-Hubbell - an AV Rating is Martindale-Hubbell's highest ratings for attorneys. It shows that a lawyer has reached the height of professional excellence. He or she has usually practiced law for many years, and is recognized for the highest levels of skill and integrity.

At the forefront of critical issues facing the criminal defense bar, Mr. Ellis founded the NACDL Lawyers Assistance Strike Force which has attained national

prominence for its support of criminal defense lawyers who are prosecuted, subpoenaed and harassed as a result of their ethical and vigorous defense of their clients. He also founded NACDL's Amicus Curiae Committee which, during his tenure, filed briefs in over 40 major state and federal cases throughout the United States. For his work in founding NACDL's Strike Force and Amicus Committee, he was awarded the Association's 1983 Robert C. Heeney Award for distinguished contributions to the criminal defense bar.

Mr. Ellis has been interviewed extensively by the national media, including the New York Times, Washington Post, Thne Magazine, USA Today, "NBC Nightly News", "ABC World News Tonight", "CNN Prime News", "CBS Radio News", and "National Public Radio".

He has been featured in the American Bar Association Journal, the San Francisco Recorder, the Philadelphia Inquirer, the Pacific Sun and profiled by the syndicated TV magazine show, "In America/The West" as well as KGO TV, the ABC affiliate in San Francisco. Mr. Ellis has written numerous editorials on criminal justice issues which have appeared in the Wall Street Journal, San Francisco Chronicle, Atlanta Constitution, San Diego Union, Oakland Tribune, Sacramento Bee, St. Louis Post Dispalch, Chicago Tribune, Salt Lake City Tribune, Pittsburgh Press, and LaOpinion. Mr. Ellis authors a regular quarterly column on Federal Sentencing for the American Bar Association's Criminal Justice Magazine and is the Publisher of "Federal Presentence and Post Conviction News" and the co-author of the Federal Prison Guidebook, the Federal Sentencing Guidebook and Federal Post

Convic[illegible] Guidebook.

He has served as a member of the editorial board of the Criminal Practice Manual published by the Bureau of National Affairs Inc. and Drug Law Report published by Clark Boardman, Ltd.

A former law professor and federal law clerk to two federal judges, Mr. Ellis is a 1967 graduate of Villanova University School of Law and an editor of the Villanova Law Review.

Mr. Ellis, age 61, is married to Lianne C. Scherr, a mitigation specialist member with the firm, has two children and two grandchildren and a golden retriever.

District of Columbia Court of Appeals
Committee on Admissions
500 Indiana Avenue, N.W. –
Room 4200 Washington, D. C. 20001
202 / 879-2710

I, GARLAND PINKSTON, JR. , Clerk of the District of Columbia Court of Appeals, do hereby certify that DONALD RAY HARRIS was on the 1st day of MARCH, 2009 duly qualified and admitted as an attorney and counselor and entitled to practice before this Court and is, on the date indicated below, an active member in good standing of this Bar.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of this Court at the city of Washington, D. C . , on September 27, 2005.

September 27, 2005.

GARLAND PINKSTON, JR. , CLERK
Deputy` Clerk

Declaration

I, Donald R. Harris. and attorney licensed by the Bar of the District of Columbia. I practice law in the Northern District of Ohio Federal Courts. I have been admitted to practice before the United States District Court in Northern Ohio and The United States Bankruptcy Court for the Northern District of 'Ohio, I do affirm and state the following:

1. I have passed all the requirements to practice before the bankruptcy bar in the Northern District of Ohio.

2. I have been admitted pro hac vice before the United States Bankruptcy Court for the Middle District of Florida in Orlando, Florida.

3. I have been admitted pro hac vice before the United States Bankruptcy Court for the Southern District

4. I have been harmed by the inability to practice in other jurisdictions of the Federal Bankruptcy Courts even though I have met the requirements of the Federal Bar in the above mentioned districts.

Further sayeth naught
Donald Ray Harris
Dated: 10/24/05

Before me a notary, appeared Donald Harris on this 24th day of October 2005.

DECLARATION OF KENNETH OWEN

I, KENNETH OWEN, am competent to testify, and have personal knowledge, and if called as a witness would declare under oath the following in support of the complaint NAAMJP v. Bush and the relief requested therein:

1. I am an officer of the NAAMJP. I am a member of the State Bar of Arizona, the District Court of Arizona, the Ninth Circuit, numerous other United States Courts of Appeals, and the United States Supreme Court. I practice in immigration law with a focus on federal appeals.

2. I am as an officer of the NAAMJP authorized to make this Declaration in support of our complaint and motion for preliminary injunction and injunction. As the 13 colonies joined together for their common purposes, the NAAMJP is a non-profit public benefit corporation, organized under California law with offices in Los Angeles, CA, that has joined together for a common purpose. We are a national association and have members working and living throughout the United States.

3. Our members, like myself, are often called upon to travel to and serve as counsel for our clients and prospective clients in states other than in the State where we are initially admitted. Our members are often called upon to travel across state lines to vindicate federal rights including their own rights.

4. The NAAMJP public purpose is stated in our name, and it is also to assist and facilitate our members First

Amendment rights and the adopting of the recommendations of the ABA MJP Commission.

5. Our associational mission is also not unlike the NAACP. The National Association for the Advancement of Colored People was organized and operated because black people were not being treated equally under our Constitution because of popular prejudice against them. As elegantly stated by Martin Luther King, Jr., "The right to petition includes the right to petition for rights." Attorneys in this 21St Century, often times are treated much like black people when they cross state lines because of popular prejudice against them. They are denied equal privileges and immunities. They are denied the right to petition for rights. The Bill of Rights sacred promise has been betrayed by the United States government by secret vote without any record being made of the proceedings.

6. Attorneys in this 21 St Century - much like our Founding Fathers who stated the famous taboo "No taxation without representation" - are being taxed by the United States government and denied their rights to choose their representatives in the United States District Courts by the challenged local rules. These local rules betray the core promises upon which our more perfect Union was formed.

7. The NAAMJP as an organization is injured by the challenged local United States District Court rules because we cannot associate and select our counsel of choice in order to petition for the redress of grievances. Our members individually are also injured by the challenged local rules because the NAAMJP is

handicapped in expressing their associational and petition rights. When more than one person joins together to express their communication in a petition, each has an indivisible and united interest in the redress of those grievances.

8. For example, the NAAMJP, as well as myself individually, are injured-in-fact by the local rules of the District Courts in New Jersey and California. These local rules only permit local attorneys to gain admission in the federal district courts in New Jersey and California. The NAAMJP is injured-in-fact because I am categorically, and so are many of our other members, categorically barred from serving as counsel for our filing the subject complaint by the local rules of the District of New Jersey and the Central District of California.

9. I am neither a member of the State Bar of New Jersey nor California. Thus I am categorically barred from general admission in all of the federal district courts sitting in California. I also live in California. As such, I am categorically disqualified from pro hac vice admission in the Southern, Central, and Eastern District Courts of California because I live and work in California. In other words, I can represent my clients before United States Immigration Courts, the District of Arizona, the Ninth Circuit, and the U.S. Supreme Court, but not the federal district courts sitting in California.

10. As one attorney that we have requested to assist us has succinctly stated the issue, "you want to retain me to bust up our monopoly?" This federal "local" rule discrimination provides a reinforcing steel sword and

Chinese wall for state unlawful conduct.

11. We are, and I am, further injured because we cannot freely vindicate federal rights and champion locally unpopular causes that arise from unlawful State laws - that could be challenged in federal district court - because of State law that has nothing to do with federal law and federal bar membership.

12. What is at issue in this Complaint is not a controversial subject such as the right to abortion, or the right to gay marriage, what is at issue here arises from Congressional enumerated powers and is squarely protected by the Bill of Rights: speech, association, assembly, petition in a public forum, and travel.

13. The NAAMJP, as well as myself, are further injured by the local rules of the Eastern District of Pennsylvania. Arizona does not have reciprocity with Pennsylvania. I am thus categorically denied general bar admission in the Eastern District of Pennsylvania because of the State of Pennsylvania's rules adoption by reference. The NAAMJP is injured because every time a local District Court rule drives up the cost of petitioning for redress of grievances or discriminates against out-of-state attorneys or citizens our government of checks and balances - is overwhelmingly weighted in favor of local state interests and federal interests are categorically disrobed.

Sworn to under penalty of perjury under the laws of the United States.

Dated: October 10, 2005
Kenneth Owen

CONFERENCE OF CHIEF JUSTICES

Resolution 36

Regarding the ABA Commission on Multi-Jurisdictional Practice

WHEREAS, the states' highest courts regard consumer protection and an effective system of professional regulation as one of their prime responsibilities; and

WHEREAS, the Commission on Mufti-Jurisdictional Practice (the MJP Commission) has outlined a series of steps to improve the American Ear Association's model rules on the practice of law and the regulation of the profession; and

WHEREAS, the Commission's report emphasizes and reaffirms the central role of state courts in implementing improvements in law practice and professional responsibility,

NOW THEREFORE BE IT RESOLVED that

1. The Conference of Chief Justices commends the proposals of the MJP Commission as a good platform on which states can build more effective, more predictable regulation; and

2. The Conference of Chief Justices asks its representative in the ABA's House of Delegates vote to adopt the recommendations of the MJP Commission.

Report 201G

AMERICAN BAR ASSOCIATION COMMISSION ON MULTIJURISDICTIONAL PRACTICE REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, that the American Bar Association adopts the proposed Model Rule on Admission by Motion, dated August 2002:

Model Rule on Admission by Motion

l. An applicant who meets the requirements of (a) through (h) of this Rule may, upon motion, be admitted to the practice of law in this jurisdiction.

The applicant shall:

(a) have been admitted to practice law in another state, territory, or the District of Columbia;
(b) hold a first professional degree in law (J.D. or LL.B.) from a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association at the time the graduate matriculated;
(c) have been primarily engaged in the active practice of law in one or more states, territories or the District of Columbia for five of the seven years immediately preceding the date upon which the application is filed;
(d)establish that the applicant is currently a member in good standing in all jurisdictions where admitted;
(e)establish that the applicant is not currently subject to lawyer discipline or the subject of a pending

disciplinary matter in any other jurisdiction;
(f) establish that the applicant possesses the character and fitness to practice law in this jurisdiction; and
(g) designate the Clerk of the jurisdiction's highest court for service of process.

2. For the purposes of this rule, the "active practice of law" shall include the following activities, if performed in a jurisdiction in which the applicant is admitted, or if performed in a jurisdiction that affirmatively permits such activity by a lawyer not admitted to practice; however, in no event shall activities listed under (2)(e) and (f) that were performed in advance of bar admission in the jurisdiction to which application is being made be accepted toward the durational requirement:

(a) Representation of one or more clients in the practice of law;
(b) Service as a lawyer with a local, state, territorial or federal agency, including military service;
(c) Teaching law at a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association;
(d) Service as a judge in a federal, state, territorial or local court of record; (e) Service as a judicial law clerk; or
(f) Service as corporate counsel.

3. For the purposes of this Rule, the active practice of law shall not include work that, as undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was performed or in the jurisdiction in which the clients receiving the unauthorized services were located.

4. An applicant who has failed a bar examination administered in this jurisdiction within five years of the date of filing an application under this rule shall not be eligible for admission on motion.

REPORT

At one time, lawyers tended to maintain their law offices in a single jurisdiction over the course of their entire legal careers because of the local nature of law practice. Today, in contrast, geographic mobility is unexceptional. Lawyers move from one state to another in order to continue to serve clients who are relocating or to better serve clients that function outside the state, for personal reasons, for career advancement, or for a host of other reasons. Lawyers change law firms or employers, or simply reestablish their individual practices in different jurisdictions. Lawyers in large law firms move from one office of their firm to another. Lawyers employed by corporations move from one corporate office to another.

Jurisdictional restrictions impede national mobility, because in many cases the process for admitting lawyers to practice law in a new jurisdiction is lengthy, expensive, and burdensome. Some states subject a lawyer who is already licensed and experienced in legal practice to the process designed for admitting new law school graduates. The practicing lawyer is required to take the state bar examination and, upon receiving a passing grade, to undergo character and fitness review.

Although the primary concern in the submissions to the Commission has been the application of UPL restrictions to United States lawyers' occasional practice in jurisdictions in which they do not maintain an office, the Commission has also received submissions focusing on the difficulty of establishing a law practice in a new jurisdiction.

A number of states facilitate the admission of experienced lawyers who are moving their law practice by allowing them to gain admission to the bar without sitting for the bar examination, if they demonstrate that they have been in active law practice in another jurisdiction for a specified period of time and are members in good standing of the other jurisdiction's bar. fn2 The admission on motion processes in these states recognize the reality that lawyers who have been admitted to another state's bar and have practiced actively for a significant period of time without disciplinary sanction are qualified to establish a law practice in the new state, and that, for experienced lawyers, the bar examination therefore serves as an unnecessary obstacle to establishing a practice in the new state. This is particularly true because, with the advent of multi-state bar examinations, most bar examinations have become increasingly less distinctive and less focused on the idiosyncrasies of individual states' law. There is nothing to suggest that in states with admission on motion, particular regulatory problems are disproportionately presented by lawyers who gain admission by this process.

Further, as urged by the ABA Section of Legal Education and Admissions to the Bar, it is worthwhile to attempt to distill and standardize the criteria used by states that employ streamlined admissions processes. Fn3 Accordingly, the Commission recommends that the ABA adopt the Model Rule on Admission by Motion developed by the ABA Section of Legal Education and Admissions to the Bar. It should be understood that admission on motion is not an alternative to the multijurisdictional practice standards in proposed Rule 5.5 of the Model Rules of Professional Conduct, since no

lawyer can realistically be admitted to every state bar, even on motion. The motion rules are directed at those lawyers who expect to relocate their practices or to practice regularly in two or more jurisdictions.

Footnotes

Fn1See, e.g., J. Eric Schaal, Associate General Counsel, USG Corporation, letter dated January 8, 2002 to the ABA Commission on Multijurisdictional Practice, www.abanet.org/cpr/mjplcomm2 us .html.

Fn 2 See, e.g., Alaska Bar Rule 2, Section 2 (applicant must have passed bar in at least one jurisdiction and have engaged in active practice of law five of seven years preceding date of application in state that offers reciprocal admission to Alaska lawyers, provided conditions are not more demanding than those in Alaska, and pay a non-refundable fee); Colorado Admission Rule 201.3(1) (admits applicants actively and substantially engaged in the practice of law for five of seven years preceding application in state providing reciprocal admission without exam to members of the Colorado Bar); Connecticut Rules of the Superior Court Regulation Admission to the Bar, Sec. 2-13 (applicant must have practiced law in a reciprocal jurisdiction for at least five of seven years preceding date of application, be in good standing, have good moral character and have passed an examination in professional responsibility or completed a course in professional responsibility, intend to practice law on a continuing basis and devote a major portion of work time to practicing law in Connecticut, and file a fee and affidavits regarding character, education and disciplinary record); Illinois Admission Rule 705

(applicant must meet educational, character and fitness requirements for Illinois attorneys, pass the Multistate Professional Responsibility Examination, practice continuously five of seven years in jurisdiction offering reciprocity, and pay fee for admission on foreign license); Missouri Supreme Court Rules Governing the Missouri Bar, Rule 8.10 (applicant must have graduated from an ABA approved law school and be licensed and actively practicing five of preceding ten years in at least one jurisdiction offering mutuality of admission without examination; applicant must also meet continuing education requirements, pay a non-refundable fee, file a form for a character and fitness report and file various affidavits regarding work experience and good moral character); New York, Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law, Section 520.10 (applicant must have been admitted to practice in highest law court in a state or territory of the United States or in another country whose jurisprudence is based upon the principles of the English Common Law and be admitted to the bar of a jurisdiction that would similarly admit New York lawyers without examination; in addition, the applicant must be over 26 years of age, possess a first degree from. approved law school, have practiced five of preceding seven years, pay a fee and submit to other tests of character and fitness at discretion of Appellate Division); North Carolina Supreme Court Rules Governing Admission to the Practice of Law Section .0502 (applicant must be in good standing in every state in which applicant is licensed, have active practice four of preceding six years in a state providing comity admission for North Carolina lawyers, supply complete background information, pay nonrefundable fee of $1500, establish

good moral character, pass the Multistate Professional Responsibility Examination, and supply various types of documentation including certificates of moral character, a recent photograph and fingerprints; applications are not considered until at least six months after the date of filing); Oklahoma Rules Governing Admission to the Practice of Law, Rule 2 (applicant must have graduated from an ABAapproved law school, show good moral character, have practiced five of seven preceding years and be in good standing in a reciprocal jurisdiction, and provide at applicant's expense a report by the National Conference of Bar Examiners; if rules of reciprocal admission and fees in applicant's former jurisdiction are more stringent for admitting Oklahoma lawyers, applicant shall be governed by the more stringent standards); Pennsylvania Bar Admission Rule 204 (applicants must have graduated from an ABA-approved law school, practiced for five of preceding seven years in a reciprocal jurisdiction, passed the Multistate Professional Responsibility Examination and meet various other conditions); Virginia Supreme Court Rule 1A:l (application must be filed under oath with a certificate saying lawyer has been licensed for at least five years; applicant must also complete character and fitness questionnaire, furnish report of the National Conference of Bar Examiners upon request, and pay $500 filing fee; thereafter, the Board will determine whether applicant has established an intention to practice full time as a member of the Virginia Bar and whether applicant "has made such progress in the practice of law that it would be unreasonable to require the applicant to take an examination"); Washington Admission to Practice Rule 18 (admission of lawyers from jurisdictions with substantially similar conditions

for admitting Washington lawyers, upon proof of admission to practice, current good standing, active legal practice, moral character and fitness, and payment of a filing fee; if the jurisdiction that licensed the applicant requires Washington lawyers to meet other conditions, the applicant must meet a substantially similar requirement); West Virginia Supreme Court of Appeals Rules for Admission, Rule 4.0-4.5 (applicant must demonstrate intention to practice in West Virginia on at least a minimal basis, have practiced five of last seven years, hold valid license from state in which admissions standards are substantially equivalent to standards in West Virginia, show proof of good moral character and submit affidavits of good character from at least two lawyers, pass the MPRE, provide records of criminal, disciplinary and civil proceedings, and pay application fee); Wisconsin Supreme Court Rule 40.05 (reciprocity for applicants admitted in jurisdictions that grant similar admission to Wisconsin lawyers and recognize Wisconsin's diploma privilege and applicant must have practiced for three of preceding five years); Wyoming Statute 33-5-110 (admits foreign attorneys who have been awarded a J.D. or LL.B. from an ABA-approved law school, engaged in practice five of prior seven years in a reciprocal jurisdiction, upon presentation of certificate of admission to that state and upon a showing of qualification, character and fitness to practice law). cf. Maryland Code Sec. l0-210 and Rule 13, Maryland Rules Governing Admission to Bar.

Fn3 See Counsel of the Section of Legal Education and Admissions to the Bar, Memorandum to the ABA Commission on Multijurisdictional Practice (Feb. 14, 2001), http;//www.abanet.org,/cpr/mip/comm2 -

leab.html.

AMERICAN BAR ASSOCIATION

LAW PRACTICE MANAGEMENT SECTION
STANDING COMMITTEE ON LEGAL
ASSISTANCE FOR MILITARY PERSONNEL
SPECIAL COMMITTEE ON PROFESSIONAL
MEDICAL LIABILITY THE BAR ASSOCIATION
OF THE DISTRICT OF COLUMBIA, CUYAHOGA
COUNTY BAR ASSOCIATION FEDERAL
COMMUNICATIONS BAR ASSOCIATION AKRON
BAR ASSOCIATION
DAUPHIN COUNTY BAR ASSOCIATION
CLEVELAND BAR ASSOCIATION FEDERAL
ENERGY BAR ASSOCIATION THE BAR
ASSOCIATION OF METROPOLITAN ST. LOUIS
SAN DIEGO COUNTY BAR ASSOCIATION
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, That the American Bar Association supports efforts to lower barriers to practice before U.S. District Courts based on state bar membership by eliminating state bar membership requirements in cases in U.S. District Courts, through amendment of the Federal Rules of Civil and Criminal Procedure to prohibit such local rules.

REPORT

THE PROBLEM

Some United States District Courts restrict practice privileges to lawyers who are admitted to the state bar in which the district is located.

For example, in the Washington, DC metropolitan area, a lawyer admitted to practice in the United States District Court for the District of Columbia may be admitted to the bar of the United States District Court for the District of Maryland regardless of Maryland State bar membership. See D. Md. Local Rules 101, 701 attached hereto.*

However, in the United States District Court for the Eastern District of Virginia, located in Alexandria, Virginia, District of Columbia bar members may not become members of the Eastern District of Virginia bar without being members of the Virginia bar, which requires a bar exam for non-Virginia residents. See E.D. Va. Local Rule 7, copy attached hereto. Similar problems exist in many other contiguous Federal District Courts. See attached random survey.

IMPACT

This is not a local or regional problem. See attached random survey. * The Law Practice Management Section has discussed and reviewed this problem through its Goal 6 Task Force and debated it at its Spring 1993 Section meeting. While not all districts are as restrictive as the Eastern District of Virginia, many others require local counsel to at least be on all pleadings and restrict the number of times an out of district attorney may appear pro hac vice. We submit these are unnecessary and drive up the cost of litigation to clients.

This exclusionary policy inhibits competition, restricts lawyers from representing clients without incurring the substantial cost of local counsel and drives up costs to

clients. Therefore, appropriate action should be taken to eliminate such exclusionary and anticompetitive practices.

*Copies of attachments are available from the Law Practice Management Section upon request. Please call Alice Tully at 312-988-5661.

POSSIBLE OBJECTIONS AND REBUTTAL

OBJECTION 1. Knowledge of local law is required in each state

Rebuttal: Local law can be learned by any lawyer or local counsel will be retained or consulted as necessary.

OBJECTION 2. Out of state lawyers will not know the local rules.

Rebuttal: Each lawyer must certify that he or she has read and is familiar with the local rules prior to being admitted to the bar of the local District Court. See D. Md. Local Rule 701.

OBJECTION 3. Out of state lawyers will be disciplinary problems or hard to reach.

Rebuttal: Out of state lawyers will be subject to the same discipline as in state lawyers and will be reachable in the same way.

OBJECTION 4. Local counsel are needed in cases.

Rebuttal: This should be the decision of the lawyer and client, not mandated by local rule.

CONCLUSION

Given the global nature of law practice today, parochial local rules are inefficient, unduly costly to clients and/or lawyers and anti-competitive. Therefore, this proposal should be adopted.

Respectfully submitted,
Donna M. Killoughey Chair
Section of Law Practice Management
Dated: November 21, 1994

Civil Action No.
05-cv- 5081 TON

UNITED STATES DISTRICT COURT FOR FOR
THE EASTERN DISTRICT OF PENNSYLVANIA
NAAMJP (National Association for the
Advancement of Multijurisdiction Practice),
John F. O'Rourke, Alan Ellis, Donald Harris.
Plaintiffs,

v.

George W. Bush, Alberto R. Gonzales, Hen. John W. Bissell, Chief Judge for the United States District Court for the District of New Jersey, Dennis M. Cavanaugh, Joseph A. Greenway, Jr., Katharine S. Hayden, Faith S. Hochberg, Jose L. Linares, William J. Martini, Joel A. Pisano, Alfred M. Wolfin, Hon. Consuelo B. Marshall, Chief Judge United States District Court for the Central District of California, Percy Anderson, Terry J. Hatter, Jr., Ronald S.W. Lew, Nora M. Manella, Howard A. Matz, James S. Otero, Dean D. Pregerson, George P. Schiavelli, Christina A. Snyder, John F. Walter.

February, 1995

STATEMENT OF MARVIN COMISKY

I, MARVIN COMISKY, am competent to testify, and have personal knowledge of the subject matter of this litigation, and if called as a witness would testify the following:

1. I was admitted to the Pennsylvania Bar in 1942 and except for military service from late 1942 to the spring of 1946,1 have been a practicing lawyer.

2. I am a litigator with an appellate-practice specialty. I was admitted to all Courts in Pennsylvania, various Federal District Courts, Federal Courts of Appeal and the U.S. Supreme Court. Attached as an Exhibit is a copy of my resume.

3. My practice was in part practicing in states other than Pennsylvania.

4. When I commenced practicing in Pennsylvania, each judicial district had its own individual admission requirement. This practice was still in place when I became Chancellor of the Philadelphia Bar Association in 1965.

5. Lawyers admitted to practice in Philadelphia, thus, could not appear as practicing lawyers in any other judicial district in Pennsylvania. They were required to have their admission moved Pro Haec Vice or as occurred in most instances, retain lawyers authorized to practice in that individual county as co-counsel.

6. Thus, Philadelphia lawyers were unable to represent fully and individually the client who retained them. In all such instances when co-counsel was retained, fee splitting occurred between counsel and co-counsel.

7. On behalf of the Philadelphia Bar Association with the cooperation of the Pittsburgh Bar Association, as Chancellor of the Philadelphia Bar Association, I filed a petition with the Pennsylvania Supreme Court to

eliminate these intra-state barriers.

8. In 1965, the Pennsylvania Supreme Court granted the petition without hearing and argument. It changed the rules to eliminate the county barriers and issued an Order declaring upon admission to the Pennsylvania Supreme Court, a lawyer was authorized to practice in all judicial districts and appellate courts in Pennsylvania. Because of different pockets of resistance in some of the judicial districts, it took about five years for the barriers to be fully eliminated. Today, many young lawyers have no memory of these county restrictions, and find these prior local restrictions inconceivable.

9. Speaking for myself as a member of the bar interested in the administration of justice process, I have been a long-time advocate for a uniform federal district court bar admission. See Comisky & Patterson, The Case for a Federally Created Bar By rule Or By Legislation, 55 Temple L.Q.945, 975 (1982) Quoting from that article "Conclusion: the dynamic changes that are now taking place in the practice of law, resulting in the increasing trend towards multi-state law practice and the growth of national and international law firms, have caused `state imposed' barriers to the modern practice of law to become obsolete, inefficient, expensive, and detrimental to the public interest".

9. I fully support the elimination of state imposed barriers to the practice of law in the federal district courts.

MARVIN COMISKY

Exhibit O - SCIENTIFIC TESTS DEMONSTRATE EXPERTS AND NOVICES ARE MORE QUALIFIED TO JUDGE COMPETENCE THAN LICENSING OFFICIALS. Attached is Klein, Sources of Power (The MIT Press 1999) Chapter 10 The Power to See the Invisible, supra, "Example 10.1 The Instructors Who Couldn't Save Their Own Lives."

Dr. Klein demonstrates controlled tests established:

(i) nine out of ten experts were able to spot another experienced expert;

(ii) five out of ten novices who finished an eight hour course were able to spot an experienced expert; and

(iii) only three out of ten instructors (licensing officials) who taught the novices, but who never actually practiced, were able to spot an experienced expert.

Exhibit O by analogy explains why a Bombay India native who never went to law school can be judged competent on the California bar exam by those who have never practiced (See Exhibit N), and why the Dean of Stanford Law School can be judged incompetent by those who have never practiced. See Exhibit M.

This Exhibit O proof of the blind leading the blind correlates (almost 100%) with Exhibit D - the Rand Corporation studies that admit, beyond any doubt, the eight-question entirely subjective test given to experienced attorneys is less than .48% reliable.

This cumulative proof confirms the wisdom of the ABA

MJP Commission recommendation that experienced attorneys do not need to take another bar exam and should be provided reciprocal admission on motion.

Last but not least, these Exhibits demonstrate the least reliable measurement of competence is to permit novice State licensing officials to judge the competence of experienced federal practitioners.

Dated: December 20, 2005

Respectfully submitted,
JOSEPH ROBERT GIANNINI
Counsel for Plaintiffs

Sources of Power
How People Make Decisions

Gary Klein
The MIT Press
Cambridge, Massachusetts
London, England

***

We played these videotapes to three audiences: ten novices who had just finished an eight-flour CPR course, ten CPR instructors who were experienced teachers but had never performed CPR on an actual victim, and ten paramedics who had used CPR many times. The study called for the participants to make a series of judgments. The last one was perhaps the most interesting. We asked each participant to imagine that it was his or her own life on the line. They had to identify one of six people in the videotapes who they would want to do CPR on them.

The paramedics recognizcd expertise when they saw it. Nine of the ten picked the actual paramedic. When asked why, they could not point to any one thing. It was the entire pattern of his behavior, the smoothness with which he worked, that they liked. He secured to know what he was doing.

The novices too generally chose the paramedic. He got live of their ten votes. The instructors did not do as well. The paramedic in the tape was not following the rules they taught so carefully to their students. l is wasn't carefully measuring where to put his hands, for example. Only three of the instructors chose him to save their lives.

Filed 1/24/2006

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

CIVIL ACTION NO. 05-5081

NAAMJP (National Association for the Advancement of Multijurisdiction Practice), et al

v.

GEORGE W. BUSH, et al

ORDER

AND NOW, this 24th day of January, 2006, it is ORDERED that plaintiffs file a further response to defendants' motion to dismiss. Plaintiffs' brief should at least address the questions whether I have jurisdiction to set aside the Local Rules of other Districts and why each defendant is a proper defendant in this case. Should counsel for plaintiff require more time then permitted by the Rules, he should agree upon a date with defense counsel and inform the Court of that date.

Civil Action No.
05-cv- 5081 TON
CLASS ACTION
UNITED STATES DISTRICT COURT FOR
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

NAAMJP (National Association for the
Advancement of Multijurisdiction Practice),
John F. O'Rourke, Alan Ellis, Donald Harris.

Plaintiffs,

v.
Alberto R. Gonzales, et. al.

PLAINTIFFS' REPLY ARGUMENT FOR PRELIMINARY AND PERMANENT INJUCTION AND DECLARATORY JUDGMENT
(CORRECTED)

Plaintiffs file herewith their Reply Argument for Preliminary and Permanent Injunction and Declaratory Judgment.

Plaintiffs are also concurrently filing under separate cover:

1. Their Trial Exhibit List which includes a short summary of what each Exhibit proves to assist the Court in examining the supporting evidence for the requested relief.

2. Their Request to Take Judicial Notice of the extensive open national hearings and due process considerations exercised by the American Bar Association in reaching their conclusions adopted in "CLIENT REPRESENTATION IN THE 21st

CENTURY," Report of the American Bar Association Multijurisdictional Practice Commission (2002).
Dated: February 2, 2006

Respectfully submitted,

/s/ Joseph Robert Giannini

Joseph Robert Giannini, Esq.,
Counsel for Plaintiffs

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MEMORANDUM OF POINTS & AUTHORITIES

1. Questions Presented

A. Are the challenged "local" rules, which are admittedly conjunctive with state law and disjunctive with national federal law, permissible under the Rules Enabling Act and Constitution?

B. Does this Court have jurisdiction to declare and set aside "local rules" of other Districts that violate the Rules Enabling Act and Constitution?

2. The Government's Argument Is Not Trustworthy

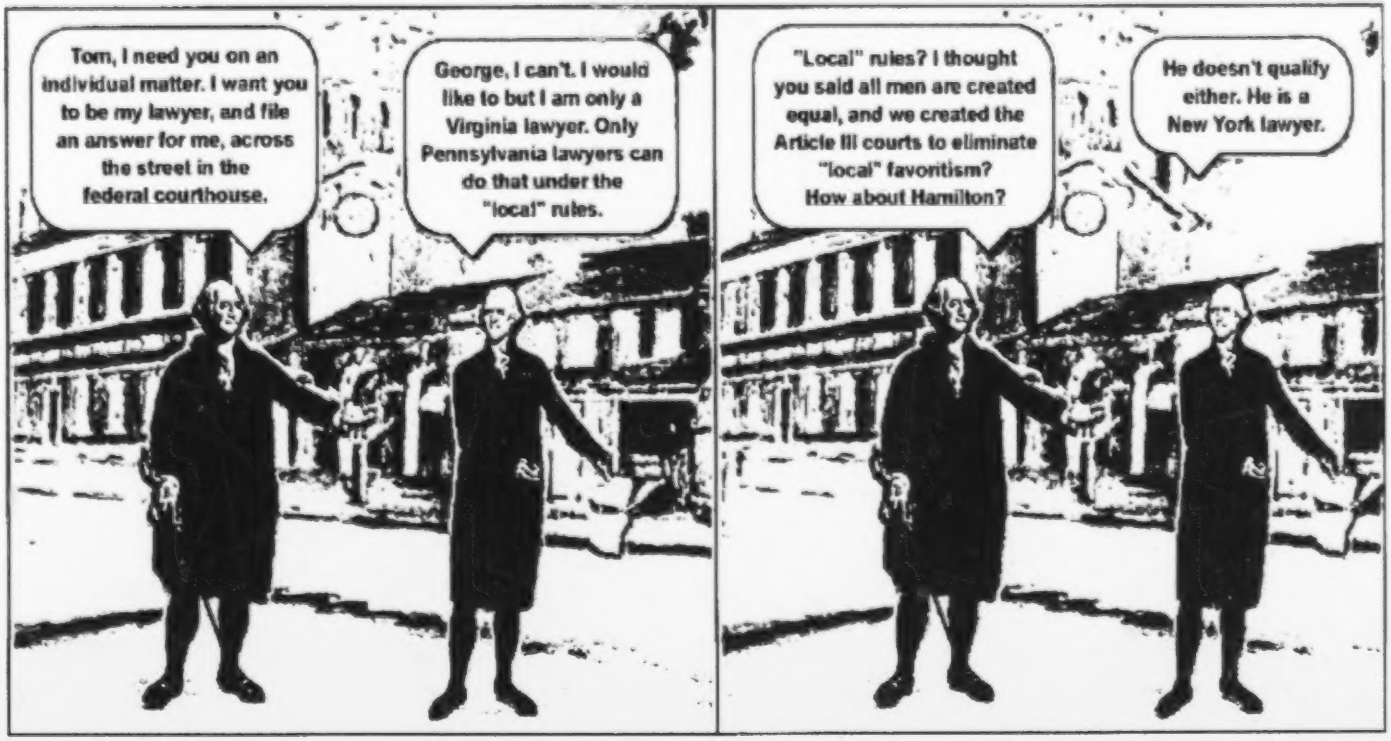
The Samuel A. Alito, Jr. and John G. Roberts, Jr., partisan Senate confirmation hearings have highlighted important facts relevant to this case. First, the nominees' steadfast refusal to say how they would vote on issues that might come before the court, and the Senate's acceptance of the nominee's refusal to state their opinions. This is to be expected. As the Senate cannot look into a crystal ball and prejudge the nominee without a hearing, the nominee cannot prejudge the outcome of any case without reviewing the evidence and arguments.

Second, the nominees' steadfast insistence their opinions written as a lawyer-advocate for the

government are not to be viewed as to how they would vote as a judge, because of the different functions performed by judge and lawyer, and the Senate's acceptance of this truth.

A defense attorney's function is to proffer a defense. A defense attorney, when confronted with a client and friend caught with his clothes off, has a duty to provide camouflage. Defense counsel's custom and habit is to do the best with what you have. As a squid, defends by clouding the waters by squirting ink and darting backwards, the government lawyer's combined Motion for Dismissal and Opposition to Injunction performs the same hiding by obfuscation and darting backwards function. It is not trustworthy. It does not present a coherent unbiased and neutral review of the evidence submitted and current law.

It has been well said a picture is worth a thousand words.


Tom, I need you on an individual matter. I want you to be my lawyer, and file an answer for me, across the street in the federal courthouse.
George, I can't. I would like to but I am only a Virginia lawyer. Only Pennsylvania lawyers can do that under the "local" rules.
"Local" rules? I thought you said all men are created equal, and we created the Article III courts to eliminate "local" favoritism? How about Hamilton?
He doesn't qualify either. He is a New York lawyer.

Defense counsel's Motion to Dismiss conveniently does not speak to the self-evident thousand words that if the Father of our Country were alive in this 21st Century, George Washington's constitutional right to petition the federal government on the sacred ground housing the United States Courthouse across the street from Independence Hall and the Liberty Bell — would not include the freedom to select as his counsel, his associates Jefferson and Hamilton, or their progeny from Virginia or New York. Defense counsel does not speak to the fact that Jefferson who penned our national creed, "We hold these truths to be self-evident that all men are created equal..." is categorically presumed unequal by the challenged local rules. Defense counsel seeks to camouflage the naked fact, that Hamilton, who almost froze to death in Valley Forge while serving as an aide de camp to Washington, and who argued on behalf of our more perfect Union. "The peace of the WHOLE ought not to be left at the disposal of a PART" See Carey & McClellan, editors, The Federalist (The Gideon Edition), Hamilton No. 80, p. 412, is categorically presumed ill-qualified to serve as counsel by the challenged "local" (sic) rules. These local rules leave the peace of the WHOLE at the disposal of a PART: The polar opposite of what our Founding Fathers envisioned for our more perfect Union, the PEOPLE accepted, and our Government promised.

To support this inversion of constitutional principles, defense counsel argues this Court should not apply the highly deferential standard of review for a Rule 12(b)(6) failure to state a claim dismissal. Defense counsel, without saying so, argues this Court should depart from the customary rule of law that all facts alleged are presumed true for the disfavored Rule

12(b)(6) dismissal. Defense counsel skips the procedural requirement that if "matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated to as one for summary judgment and disposed of as provided by Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." See FRCP 12(b)(6).

Defense counsel further does not provide any argument for the Court on the admissibility, or address any of Plaintiffs' supporting evidence. Plaintiffs have submitted over 20 Exhibits in support of their requested relief. Defense counsel has conveniently ignored the supporting evidence. This defense failure to address in their Opposition for Preliminary Injunction Plaintiffs' Exhibits waives any argument the evidence is not admissible or relevant. The motto for defense counsel is when the evidence is against you – skip it. Feign ignorance. Pretend it doesn't exist. This is the government's defense as to the facts. Pretend it doesn't exist. This evidence which will be further addressed does exist. Plaintiffs as well as their injuries and standing do exist. Truth exists. This Honorable Court does exist.

Plaintiffs have submitted precedent this Court has de novo review of the facts and law both in their Motion for Injunction and Supplemental Argument.[1]

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[1] In U.S. v. SCARFO, 263 F.3d 80 (3rd Cir. 2001), the question on appeal was a prior restraint on speech in a criminal case placed on an attorney by a court order. Here, the local rules are a prior restraint on the First and Sixth Amendment rights to speak as counsel in a public forum on matters of public interest. The Court in U.S. v. SCARFO, 263 F.3d at 91 stated:

We exercise plenary review over the legal standards applied in the District Court. See United States v. Antar, 38 F.3d

Defense counsel does not address this de novo searching standard of review because it does not want the evidence examined and weighed. If a patient went to a doctor and gave the doctor his lab test results, it would be beneath the customary standard of care in the community for the doctor to provide an opinion without examining the test results. Nevertheless, defense counsel in her role as an advocate, entreats this Court to provide an opinion without examining Plaintiffs' supporting Exhibits.

Turning to the law as distinguished from the facts, it is a cardinal rule of advocacy to put your best arguments first. Plaintiffs' first argument in their Motion for Preliminary Injunction and Declaratory Judgment is the local rules violate the Rules Enabling Act as amended by Judicial Improvements and Access to Justice Act Pub.L. 100-702, which became effective December 1, 1988. This Act, because of Congressional

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1348, 1356-57 (3d Cir. 1994). In the First Amendment context, reviewing courts have a duty to engage in a searching, independent factual review of the full record. See Antar, 38 F.3d at 1357 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964)); Fabulous Assoc., Inc. v. Pennsylvania Public Utility Com'n, 896 F.2d 780, 784 (3d Cir. 1990) (noting the exacting standard of review traditionally applied to state actions impacting on rights protected by the First Amendment). The Supreme Court has emphasized an appellate court's obligation independently to examine the whole record to ensure "that the judgment does not constitute a forbidden intrusion on the field of free expression." Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 284-286 (1964); NAACP v. Claiborne Hardware, Co., 458 U.S. 886, 933- 934 (1982); Greenbelt Cooperative Pub. Assn. v. Bresler, 398 U.S. 6, 11 (1970); St. Amant v. Thompson, 390 U.S. 727, 732-733 (1968)).

widespread disapproval with the "local" rule-making process, gave birth to a whole host of statutory amendments, including 28 U.S. § 332(d)(4), which provides,

> Each judicial council **shall** periodically review the rules which are prescribed under Section 2071 of this title by district courts within its circuit for consideration for **consistency** with rules prescribed under 2072 of this title. Each council may modify or abrogate any such rule found inconsistent in the course of such review.

Defense counsel does not bring this Congressional statute to the attention of the Court, despite a continuing ethical obligation to point out contrary authority, for several reasons. Initially, the enactment of the Judicial Improvements and Access to Justice Act of 1988 was more than a spring house cleaning. Congress essentially abandoned the prior local rule-making cabin and designed a national architecture. If counsel admits Congress has commanded the "local" rules "**shall be consistent**" with 28 U.S.C. § 2072, the local rules which are admittedly inconsistent with each other and have been characterized by a Judicial Conference report as a "minefield of inconsistency," are also inconsistent with an Act of Congress (28 U.S.C. § 332(d)(4)). Defense counsel cannot admit the 28 U.S.C. § 332(d)(4) "**shall be consistent**" language without also negating her implied arguments the Judicial Council defendants are not proper parties. Defense counsel also cannot disclose 28 U.S.C. § 332(d)(4) without sabotaging her argument the Plaintiffs are not injured by the local rule minefield of inconsistency. Each circuit judicial conference has an affirmative duty to periodically review the local rules. That duty has been plainly — even if unintentionally or

accidentally— breached because the local rules are not consistent. This inconsistency in the application of constitutional rights in our federal houses of justice results in a nation being divided against itself: Not in a more perfect Union that our Constitution was designed to provide.

Defense counsel also cannot bring 28 U.S.C. § 332(d)(4) to the Court's attention without undercutting her citation to and reliance on prior case law. The Judicial Improvements and Access to Justice Act Pub.L. 100-702 re-wrote the law. Prior case law has been superseded. The standard of review for challenges of local rules has been substantially heightened — **shall be consistent** is the mandatory standard. This standard is even higher than strict scrutiny. Local rules "**shall** not abridge, enlarge, or modify and substantive right." 27 U.S.C. § 2072(b). This heightened standard of review reflects the Congressional enactment for "local" rules of the Federalist doctrine "The peace of the WHOLE ought not be left at the disposal of a PART." The Federalist *supra*, No. 80, p. 412.

Similarly, Plaintiffs' second argument in their Motion for Preliminary Injunction is the challenged local rules should be invalidated because they are "Overbroad." Plaintiffs argued, "The challenged local rules are an enormous overbroad prior restraint on freedoms that are at the core of "a profound national commitment to debate on public issues that should be uninhibited, robust, and wide open." (citation omitted). (Motion for PI p. 33) A spell check of the Opposition Memorandum does not turn up the word "Overbroad" or its derivative "Overbreadth." Defendants' Memorandum does not proffer even a prima facie rebuttal to the "Overbreadth" doctrine.

Plaintiffs argue further (p. 333-34):

In First Amendment overbreadth cases, courts allow litigants to "challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court." Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620, 634 (1980). This is because of the "possibility that protected speech or associative activities may be inhibited by the overly broad reach of the statute." Ibid. "(W)hen there is a danger of chilling free speech, . . . society's interest in having the statute challenged" may outweigh the prudential considerations that normally counsel against third-party standing." Sec'y of State v. Joseph H. Munson Co., 467 U.S. 947, 956 (1984).

Defense counsel has played dodge ball with the "Overbreadth" doctrine because she does not want to acknowledge Plaintiffs have standing to sue to enforce the First Amendment rights of third parties not before the Court.

Plaintiffs' third legal ground for the requested relief is the local rules constitute "facial" unlawful "viewpoint discrimination." Plaintiffs argued only "local attorneys" are permitted to freely speak, freely represent their client and engage in expressive association, or freely petition for redress of grievances in a designated national public federal forum on matters of public concern. A regulation that denies one group of citizens the right to address a selected audience on controversial issues of public policy is plainly viewpoint discrimination. Consolidated Edison Co. v. Public Serv. Comn'n, 447 U.S. 530, 546 (1980). Viewpoint discrimination is a particularly egregious form of content discrimination. It is presumptively unconstitutional. Our government is prohibited from

favoring one viewpoint over another. "To permit one side of a debatable public question to have a monopoly in expressing its views . . . is the antithesis of constitutional guarantees." Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175-176 (1976). "A law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official." Lakewood v. Plain Dealer Publishing Co, 486 U.S. 750, 763 (1988).

Defense counsel's Opposition, once again, skips the "viewpoint discrimination" doctrine. Defense counsel does not even proffer a prima facie rebuttal to a doctrine the High Court has held "is the antithesis of constitutional guarantees." Defense counsel hop scotch and skipping "viewpoint discrimination" does not negate the presumption of unlawfulness. The challenged local rules are plainly unlawful viewpoint discrimination because they favor one speaker over another in a federal forum created to provide equal justice under law.

Defense counsel skips the law, "(T)he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976).

Defense counsel argues the bulk of Plaintiffs' arguments have been decided adversely against them somewhere else. Where? Defense counsel doesn't inform this Court where. Or, what was decided and what was not decided? Or, when it was decided? Defense counsel does not argue the applicability of the doctrines of *res judicata*, collateral estoppel, or the law

of the case. Defense counsel is clouding the waters with ink and retreating backwards. The fact Plaintiffs' counsel may have not met his burden of persuasion somewhere else at some other time in some other case means less than the fact the Samuel A. Alito, Jr., may have dissented from his Third Circuit colleagues, or may have been reversed by the Supreme Court while writing for a panel. Plaintiffs' counsel is an advocate not the judge. It is well known the Supreme Court in our evolving society has often reversed itself. See also Plaintiffs' Supplemental Argument p. 4-5 where this issue is briefed.[2]

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[2] See Supplemental Argument p. 4 — "This is a case of first impression. Plaintiffs are not aware of any precedent where the challenged "local" rules have been alleged to be unlawful under the Sixth Amendment right to counsel at any time, or in conjunction with the Rules Enabling Act. Similarly, Plaintiffs are not aware of any case ever filed at any time challenging the subject "local" attorney *general* admission rules under the First Amendment, or in conjunction with the Rules Enabling Act. These First Amendment challenges include Plaintiffs' claims under the Overbreadth Doctrine, Viewpoint Discrimination, Content Discrimination, Free Speech, Expressive Association, and Petition Clauses.

"These first impression First and Sixth Amendment issues presented in this case transform the earlier bar admission precedent in much the same way that computers have revolutionized the practice of law in the last 15 years. By way of example, in the early 90's before DNA testing, blood was analyzed by type. The advent of DNA testing fundamentally changed the administration of justice process. Present scientific methods permit us to map out the 46 chromosomes of the human genome from a single drop of blood. It would be malpractice to rely on blood type in a Sixth Amendment case if DNA scientific testing was available. Likewise, as with advent of DNA testing in the early 90's changing the judicial process, the advent of the American Bar Association's adoption of a *Model Rule for Admission on Motion* and *Reciprocal Discipline* in 2002 has re-

It is not an exaggeration to say the Assistant United States Attorney in this case, Virginia Powel, has won at least 95% of her cases for 20 years in the Eastern District of Pennsylvania. She is a skillful lawyer. She has been provided three lengthy continuances to respond to Plaintiffs' Motion for Preliminary Injunction. Yet, the government's Opposition skips 20 exhibits, skips the de novo standard of review, skips the "**shall be consistent**" statute, and skips the Overbreadth and Viewpoint Discrimination doctrines. If defense counsel had a valid rebuttal to these facts and law, it would have been presented. It has not been presented because there is none. After Galileo invented the telescope, he argued the heavens were filled with imperfections. Many people were afraid to look into the telescope. Additionally, secrecy is not congenial to truth-seeking. Defense counsel has refused to cooperate in providing the initial mandatory disclosures and in creating a discovery plan as is required by Rule 26(f). (See Plaintiffs' Exhibit X). Defense counsel has also stonewalled reasonable discovery including Requests to Admit, Interrogatories, and the videotaped deposition of the Attorney General. (See Plaintiffs' Exhibit Y).

Defense counsel is fully aware that her client defendant Alberto R. Gonzales is not going to testify that attorneys from Texas are not competent to practice federal law outside of the State in which they are licensed. Defense counsel is fully aware that Alberto R. Gonzales is not going to testify former federal law clerks and Department of Justice lawyers

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written what is reasonable and rational and necessary for the judicial process."

are not competent to practice federal law after leaving federal employment. Alberto R. Gonzales is not going to testify under oath in a deposition or anywhere else American lawyers and citizens should have unequal constitutional rights. Alberto R. Gonzales is not going to testify that the American Bar Association MJP Commission got it wrong, and this MJP Commission Report should be ignored by the federal judiciary.

In sum, the government's argument is not trustworthy. Defense counsel in the partisan role of an advocate, solicits this Honorable Court to retreat into a shell and enter judgment against American citizens without reviewing the evidence or examining the most recent law. Defense counsel, like those in the government church who were afraid of Galileo, mistakenly projects that this Honorable Court, who has sat and served in the chambers of the United States Supreme Court and has served as a United States District Judge in the City of Brotherly Love, is afraid to see the truth. Americans have enshrined the right to petition the government for redress of grievances. That is why Plaintiffs are here.

3. Plaintiffs Are Irreparably Injured and Have Standing To Challenge The "Minefield" of Inconsistent Local Rules

Plaintiffs have challenged the local rules both on its face and as applied. Plaintiffs also have challenged the local rules both in their status as attorneys seeking *general* admission privileges, and as individuals who seek the freedom to associate and petition with their counsel of choice. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v.

Burns, *supra*, 427 U.S. 347, 373 (1976).

As noted previously, in First Amendment "Overbreadth" cases, courts allow litigants to "challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court." Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620, 634 (1980). This is because of the "possibility that protected speech or associative activities may be inhibited by the overly broad reach of the statute." Ibid. "(W)hen there is a danger of chilling free speech, . . . society's interest in having the statute challenged" may outweigh the prudential considerations that normally counsel against third-party standing." Sec'y of State v. Joseph H. Munson Co., 467 U.S. 947, 956 (1984).

Plaintiffs have either alleged or submitted evidence of the following facial or as applied injuries:

- Moore's Federal Practice 3rd Ed., Judith A. McMorrow and Daniel R. Coquillette, "The Federal Law of Attorney Conduct," § 801.20(7) p. 801-59 states, "**The federal local rules governing attorney admissions are a minefield of inconsistent requirements,** almost entirely unrelated to the actual characteristics of any particular type of district." (emphasis added) This facial inconsistency in federal access to justice subverts our Constitutional compact for a more perfect Union and equal justice under law, on its face and as applied to Plaintiffs and others not before the Court.
- Plaintiff John F. O'Rourke is a 100% disabled Vietnam Veteran, graduate of Temple University Beasley School of

Law, and patent attorney. Plaintiff alleges he is directly injured financially and in the opportunity for further advancement by the challenged local rules as applied to him in California and elsewhere which deny him federal *general* bar admission privileges based on state law. (See Exhibit A) Plaintiff alleges he is stigmatized by being categorically presumed either incompetent or unethical by the challenged and archaic local rules which piggy-back State law that has nothing to do with his federal practice specialty. Plaintiff alleges this State presumption of inequality vicariously adopted by local rules flies in the face our sacred creed all men are created equal. See Sperry v. Florida, 373 U.S. 379, 383 (1963)("'the law of the state, though enacted in the exercise of powers not controverted, must yield' when incompatible with federal law.").

- Plaintiff Alan Ellis was the editor of the Villanova Law Review. He clerked for the Honorable Raymond J. Broderick and the Honorable John W. Lord. He has been recognized as a leading expert on federal criminal law and sentencing guidelines. Mr. Ellis has a national federal criminal law practice, and he alleges financial and personal injury as applied to him because he is denied general bar admission privileges nationally which drives up the cost of his services. Mr. Ellis alleges wasted time and money without any

corresponding benefit as the *pro hac vice* admission alternative is inadequate to meet his and his client's needs. Mr. Ellis alleges he has been further injured because he has been denied *pro hac vice* admission in California because he has an office location in the State. (See Amended Exhibit B)

- Plaintiff Donald Harris is a Yale graduate with a national bankruptcy practice, who alleges harm as applied to him by his inability to practice in other bankruptcy districts by their local rules. See Exhibit C.
- Plaintiff NAAMJP per the Declaration of Kenneth Owen alleges First Amendment injury on behalf of its members that have joined together for a common purpose by the challenged local rules. Plaintiff NAAMJP is injured as applied to it, because it is barred from filing this exact same lawsuit, by the challenged local rules of the District of Columbia and the Central District of California in these defendant courts. Plaintiff alleges, "This federal "local" rule discrimination provides a steel sword and Chinese Wall for state unlawful conduct." See Exhibit D.
- Kenneth Owen has submitted a Declaration that he is unable to file a federal petition on behalf of his client in the Hawaii District Court because of being unable to find local sponsoring

counsel for *pro hac vice* admission status. See Exhibit W.

- The American Bar Association has declared the challenged local rules injure the integrity of the Court, public and profession. See Exhibit E ABA 1995 Adoption of Recommendation 8A Calling for Elimination of State Bar Membership Requirements for Practice before U.S. District Courts.
- Declaration of Marvin Comisky as to facial injury to public and profession. See Exhibit G.
- Declaration of David B. Fawcett as to facial injury to public and profession. See Exhibit H
- Plaintiffs further assert they are injured and the rights of others are injured because 27,255 attorneys were admitted to another State's Bar on Motion in between 1999-2004. These 27,255 "mainstream" attorneys admitted on motion to the States were categorically ineligible for *general* admission privileges to the bar regardless of individual merit by the "extremist" "local" rules of the United States District Courts for the Districts of New Jersey and California.
- Plaintiffs further assert they are injured because the defendants have never held hearings or examined "CLIENT REPRSENTATION IN THE 21st CENTURY" Report of the American Bar Association Multijurisdictional Practice Commission (calling for reciprocal

admission on motion for experienced attorneys and reciprocal discipline. See Exhibit P. Plaintiffs further assert the Supreme Court has recognized that the American Bar Association's guidelines define the standard for reasonableness in the profession. Plaintiffs assert the defendants have a constitutional duty to periodically review the local rules (28 U.S.C. § 332(d)(4)), and examine this evidence de novo, and that statutory duty has been breached.

- Plaintiffs further assert they and others not before the Court are injured because of the challenged "local" rule federal delegation of duty to the forum state without any accompanying standard. See Loving v. United States 517 U.S. 748, 771-74. (1996) (Acknowledging that a delegation must contain some ``intelligible principle'' to guide the recipient of the delegation.) This results in grossly inconsistent State standards. Cf. Exhibit M –Stanford Law Dean Fails California bar exam for experienced attorneys: Exhibit N –Bombay, India Native Who Never Attends Law School Passes California Bar Exam.
- Plaintiffs are American citizens and federal practice experts and they have less rights under the challenged local rules than foreign lawyers have in 26 states who have been certified as privileged to practice foreign law. See Exhibit V. The State of California

provides foreign lawyers more freedoms and privileges than the local federal district court rules in California provide to sister-state federal practice attorneys.

- Plaintiffs further assert they are injured because the "local" rules adopt "extremist" policies. The Conference of Chief Justices has adopted the ABA MJP Commission Recommendation (Exhibit D), and 35 States have adopted admission on motion without any further testing. See Exhibit T. See also Exhibit Q (Senator Arlen Spector "...extremists have no place on the federal bench.")
- Plaintiffs assert they are facially injured in their due process right to a fair and impartial federal judge in a federal question case, when state law is used to determine who can petition the federal government for redress of grievances. Plaintiffs assert federal judges have a conflict of interest in such a case because the local rules put him on the side of state law, and encourage a federal code of silence. For example, Plaintiffs allege RAND Corporation Reports prove the California entirely subjective bar exam given to experienced attorneys is less reliable than flipping a coin. See Exhibit F. Plaintiffs assert these extremist test results are inadmissible as evidence under the *Daubert* standards and the Federal Rules of Evidence 700 series incorporating this standard. Cf. California has rejected *Daubert*. "Twenty-six

jurisdictions have adopted the *Daubert* standards in whole or in part." David Berg, The Trial Lawyer, p. 202 (Published by American Bar Association 2003) See also Appendix A, "Table of *Daubert* Jurisdictions" listing jurisdictions. Id. at 214-15.

- Plaintiffs and others not before the Court are injured when as here federal district courts by local rules grant monopolies to forum state attorneys. See Exhibit K – Proof of Irreparable Nationwide Injury Caused by Inadequate Access to Court and Counsel. (The Legal Aid Services in a national study titled "Documenting the Justice Gap in America," reports that legal aid cannot meet the needs of 80% of the people that it serves. See Exhibit J (2.7 million cases heard last year in the Los Angeles Superior Court system, 2 million featured at least one party acting as his or her own counsel. Presiding Judge MacLaughlin said the chief factor likely is economic, "The cost of legal services has grown and grown, and it seems that fewer and fewer people are able to afford legal services.") "(U)ltimately competition will produce not only lower prices, but also better goods and services....That is equally so when the quality of legal advocacy rather, than engineering design, is at issue." FTC v. Superior Court Trial Lawyers Assn. 493 U.S. 411, 424 (1989).

- Plaintiffs allege they are injured because they have been judged competent by the State of their admission, and their federal practice experience demonstrates their competence. Scientific tests demonstrate experts as well as novice are more qualified to judge competence than licensing officials. See Exhibit O. Plaintiffs, in other words, are injured because they are by local rule standard-less delegation of duty to State licensing officials who are least likely to be able to determine their competence. These State licensing officials, for instance, know virtually nothing about the esoteric fields of patent law or federal sentencing guidelines.

4. This Court Has Jurisdiction to Enjoin Local Rules of Other Districts That Violate The Rules Enabling Act or Constitution, and the Defendants Are Proper Parties

A. Defendants Are Proper Parties

Plaintiffs have petitioned for a Declaratory Judgment and Injunctive Relief.

28 U.S.C. § 332(d)(4) provides,

Each judicial council **shall** periodically review the rules which are prescribed under Section 2071 of this title by district courts within its circuit for consideration for **consistency** with rules prescribed under 2072 of this title. Each council may modify or abrogate any such rule found inconsistent in the course of such review.

This statute calls for mandatory periodic review of the local rules, as well as the collateral authority to modify and abrogate any rule found inconsistent in such review. Plaintiffs have expressly alleged in their First Cause of Action a defendant violation of 28 U.S. § 332(d)(4).

Plaintiffs have named as defendants the Hon. Alberto R. Gonzales (Attorney General), the Department of Justice, the Honorable members of the Third, Ninth, and District of Columbia Circuits, and the Honorable members of the Central District of California and District of New Jersey. These government officials are being sued in their official capacity, as rule-makers, and enforcers of "local" rules, alleged to be unlawful and in excess of authorized discretion. Plaintiffs have in their Supplemental Memorandum p. 10 briefed why the judges are named as defendant.[3] The Attorney General is also a proper

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[3] In Frazier v. Heebe, Chief Judge of the United States District Court for the Eastern District of Louisiana, 482 U.S. 641 (1987), the petitioner attorney challenged local bar admission rules of the Eastern District of Louisiana. Initially, the petitioner attorney filed his petition in the Court of Appeals for a writ requesting the rules be invalidated. The Fifth Circuit Court of Appeals remanded the case and held the case had to be first filed in the District Court to obtain an appealable judgment. Matter of Frazier, 594 F. Supp. 1173, 1176 (E.D. La 1984). All of the judges of the Eastern District of Louisiana then recused themselves, and a judge from another district was assigned the case. Ibid. The District Court and the Fifth Circuit upheld the challenged attorney admission rule. The United States Supreme Court, however, reversed and held the District Court was not empowered to adopt Rules requiring members of the Louisiana Bar who apply for admission to its bar to live, or maintain an office, in Louisiana. The High Court held the location of a lawyer's office simply has nothing to do with his or her intellectual ability or experience in litigating cases in Federal District Court. Frazier v. Heebe, *supra*,

party because he enforces the local rules, and is the government's representative of law that is alleged to be unlawful. For example, Congress enacted the Child Online Protection Act (COPA), 47 U.S.C. § 231. The ACLU challenged this law concerning children and obscenity on the internet under the First Amendment. In Ashcroft v. ACLU, 542 U.S. 656 (2004), the High Court held the third Circuit was correct to affirm the District Court's ruling that enforcement of COPA should be enjoined because the statute likely violates the First Amendment.

In light of 28 U.S. § 332(d)(4) and Ashcroft v. ACLU, this United States District Court has authority to declare unlawful and enjoin the enforcement of local rules it concludes are unlawful.

B. This Court Has Jurisdiction Over the Parties and Controversy

Local rules impact the rights of all Americans, and not just Americans that reside within the State's boundary. Defense counsel has not argued to the contrary.

Defense counsel has not moved for dismissal for lack of jurisdiction over the person (FRCP 12(b)(2), or dismissal for improper venue (FRCP 12(b)(3), or dismissal for insufficiency of process (FRCP 12(b)(4), or insufficiency for service of process (FRCP 12(b)(5). None of these issues have been presented by learned defense counsel as justification for dismissal. The government has not moved to transfer or bifurcate. The Third Circuit has addressed

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482 U.S. 641, 650 (1987).

this issue before. Baylson v. Disciplinary Board of Supreme Court, 975 F.2d 102 (3rd Cir. 1992).

More specifically, counsel has generally appeared on behalf of all defendants. Twenty years ago, there was a popular television show called "Chico and The Man." Chico's trademark was to look around sheepishly and joke, "It's not my job!" The government has agreed that it is this Court's job to decide this controversy between Plaintiffs and all of the Defendants.

C. Defense Counsel Has Not Submitted Any Evidentiary Basis for the Local Rules' Speech, Association, and Petition Restrictions

When a court decides to impose a speech-restrictive injunction, the conclusions it reaches must be "supported by findings that adequately disclose the[ir] evidentiary basis . . ., that carefully identify the impact of [the defendants'] unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity." NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933-34 (1982). There is neither an evidentiary basis nor a judicial finding of unlawful conduct, as the "Leary Report" verifies, against non-forum state attorneys that would serve to justify the suppression of their First Amendment liberties via the "local" rules prior restraint.

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5. This Court Should Declare Unlawful and Enjoin the Enforcement of the Subject Local Bar Admission Rules That Categorically Regardless of

Individual Merit Deny General Admission Privileges

Plaintiffs submit the contours of the Rules Enabling Act as amended parallel's the High Court's analysis in U.S. Term Limits, Inc.. v. Thornton, 514 U.S. 779 (1995). There, plaintiff filed suit in Arkansas state court challenging the constitutionality of § 3 of Amendment 73 to the Arkansas Constitution, which prohibits the name of an otherwise-eligible candidate for Congress from appearing on the general election ballot if that candidate has already served three terms in the House of Representatives or two terms in the Senate. The Supreme Court held this state constitutional amendment violated the Constitution. "The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." Id. at 843 (quoting United States v. Cruikshank, 92 U.S. 542, 552 (1876),

Plaintiffs' submit the local rules violate the Rules Enabling Act as well as the Constitution. The High Court in Thornton held neither Congress nor the State could add qualifications to the Constitution's text. 28 U.S.C. § 2072 provides local rules shall not abridge, enlarge, or modify, and substantive right. The First Amendment, Bill of Rights, and right to counsel are clearly substantive. These rights are clearly enlarged and modified by the challenged local rules. These local

rules as in Thornton are further unlawful because they handicap a class of citizens in the exercise of their rights, and they erode the structure designed by the Framers to form a "more perfect Union."

The First Amendment, in pertinent part provides:

> Congress shall make no law ... abridging the freedom of speech ...; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

If Congress shall make no such law, it follows local rules shall make no such law. Our Founding Fathers well understood the inherent values in these freedoms, and how government throughout history has stood in the way of these liberties. Our Framers well understood the government often tyrannized those who disagreed with current orthodoxy. They themselves were rebels against government orthodoxy. The Framers understood Socrates was poisoned for allegedly corrupting the youth with such tuitions as "an unexamined life is not worth living." Christ was crucified for preaching Christianity. Cicero had his head and hands severed for speaking and writing against the demise of the republic. Columbus discovered American when it was thought the world was flat. Galileo was locked up for claiming the earth revolved around the sun.

As noted above, the Samuel A. Alito, Jr. and John G. Roberts, Jr. partisan Senate confirmation hearings prove competence is often measured by one's viewpoint. The democrats and republicans disagree whether the candidate is qualified along party lines. The First Amendment rights, however, should not

depend on politics. They depend on no vote.[4] Whereas Justices Roberts and Alito refused to state their legal opinions, the challenged local rules leave the opportunity for experienced federal practice specialists to practice in some federal district courts to the whim of the State's unbridled licensing discretion. These State licensing officials are the least qualified to perform this task. See Exhibit 0 (Scientific Test Results). This parallels leaving the wolf in charge of the hen house. Our sacred rights cannot be left in this state of disrepair.

Scientific advances in today's world are occurring at an exponential rate. It has been said knowledge is doubling every ten years. Science is now aware that a chimpanzee has over 98% of the same DNA as a human being. The difference between a chimpanzee and a human being is not DNA; it is the highly developed human language instinct. No chimp

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[4] As famously stated by Justice Robert Jackson, "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." Board of Education v. Barnette, 319 U.S 624, 638 (1943). "But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." Ibid. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." Ibid.

ever wrote or read a book. No chimp has ever needed a patent lawyer, or an expert on habeas corpus or federal sentencing guidelines. We, as humans learn from each other. We can speak and read. We associate and understand each other. Our world is becoming more and more specialized. "There is a growing body of specialized federal law and a more mobile federal bar, accompanied by an increased demand for specialized legal services regardless of state boundaries." Frazier v. Heebe, 482 U.S. 641, 647-48 n.7 (1987). The challenged local rules, however, have not kept up with these needs.[5] The challenged local rules by inattention treat men as if they were not men. This Court should invalidate them. A wise father does not abandon or treat his children unequally.

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6. The Challenged Local Rules Are Arbitrary and Irrational in this 21st Century

Central to this case are three sacred and inalienable liberties upon which the United States of American was founded. First, "all men are created equal." If all men are created equal, it is beyond cavil all experienced federal practice attorneys are created equal. Second, the founding principle: "no taxation without representation." Plaintiffs are experienced federal practice attorneys who are paying taxes, but

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[5] Professor Charles Wolfram, the Reporter for the American Law Institute, concludes, "[T]o an observer, membership in the bar of the federal courts looks like the work of petty fiefdoms of medieval Europe . . . Someday, sensible admission to the federal courts will be federal in nature." Wolfram, Modern Legal Ethics (1986), § 15.2.4 p. 853.

they are denied the equal right to represent their clients in the federal courts they pay federal taxes to support by "local" rules without Congressional authorization. Most of these challenged "local" rules delegating federal jurisdiction to the forum State without any intelligible standard were adopted in the 1930's when the Federal Rules of Civil Procedure were first promulgated. They made some sense then because of difficulties in travel and communication. Third, the Bill of Rights promise the federal government will not abridge the freedoms to speak, associate, and petition the federal government for redress of grievances. Defense counsel conveniently skips over these arguments.

The "National Action Plan on Lawyer Conduct and Professionalism" (Adopted by the Conference of Chief Justices January 21, 1999), declares, "(T)he vast majority of lawyers in this country are competent professionals. They are conscientious advocates of their clients' interests, honest in their representations to courts and to opposing counsel, civil to their legal colleagues, and generous contributors of their time and expertise to their communities. In short, they conduct themselves according to the highest dictates of the legal profession." See Exhibit R. The Conference of Chief Justices has stated, "Legal practice in multiple jurisdictions increasingly is the rule rather than the exception, particularly given improvements in communication and transportation technology. The appellate courts of highest jurisdiction should not only provide leadership and coordination of professionalism and legal ethics programs within their own states, but also should encourage interstate cooperation, including pooled resources." Id. at 34)

Defense counsel skips the Conference of Chief

Justices Report and the American Bar Association's MJP Commission Report that experienced sister-state attorneys do not need to take another bar exam and adoption of reciprocal discipline. These Reports puts to rest the outdated dogma out-of-state attorneys cannot competently practice law in another jurisdiction because they have not taken a beginner's level bar exam.[6]

Defense counsel has to argue something. Counsel has two primary arrows in her quiver. Both of these cases are outdated and have been supplanted by more recent authority. These cases were also not argued or decided on the facts and law argued in this case.

First, Plaintiffs will respond by addressing the sole Supreme Court precedent attorney admission case defense counsel does not try to distinguish or skip. Counsel argues three times in the Opposition (pages 12, 19, 29) — "The Constitution does not require that because a lawyer has been admitted to the bar of one state, he or she must be allowed to practice in another." Leis v. Flynt, 439 U.S. 438, 443 (1979) There, Hustler Magazine, Inc. and Larry Flynt's criminal defense counsel were denied a hearing on their applications to appear *pro hac vice*

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[6] "(N)o one has yet devised an examination which will test one's ability to be a courtroom advocate." Report and Tentative Recommendations of the Committee to Practice in the Federal Courts in the Judicial Conference of the United States. 79 F.R.D. 187, 196. "Lawyers with previous trial experience are much more likely to turn in very good performances, and it permits the inference that experience improves the quality of trial performance." Id. at 196. There is a correlation between the quality of trial performance and the prior experience of the attorneys evaluated. 83 F.R.D. at 222.

in the State Court. Flynt's lawyers did not argue the Sixth Amendment right to counsel, the First Amendment right, or the right to travel.

Leis v. Flynt has been supplanted by more recent authority. See Supreme Court of New Hampshire v. Piper, *supra*, 470 U.S. 274, 281 (1985) ("The lawyer's role in the national economy is not the only reason that the opportunity to practice law should be considered a 'fundamental right.' We believe that the legal profession has a noncommercial role and duty that reinforce the view that the practice of law falls within the ambit of the Privileges and Immunities Clause. Out-of-state lawyers may — and often do — represent persons who raise unpopular federal claims. In some cases, representation by nonresident counsel may be the only means available for the vindication of federal rights."). The United States Supreme Court has repeatedly held the norm under the Privileges and Immunities Clause is comity. Austin v. New Hampshire, 420 U.S. 656, 660 (1975); See Barnard v. Thorstenn, 489 U.S. 546, 556-57 (1989) (held that difficulties in supervising a national bar does not justify categorical discrimination in bar admission); Supreme Court of Virginia v. Friedman, 487 U.S. 59, 65-67 (1988) (held that discriminating among otherwise equally qualified applicants — in general bar admission *on motion* without taking another bar exam — solely on the basis of citizenship or residency is unconstitutional.); Saenz v. Roe, 526 U.S. 489, 500 (1999) (the right to travel protects the right of a citizen of one state to enter and to leave another state, to be treated as a welcome visitor, and the right of a new citizen of a state to be treated in the same manner as a citizen of longer standing.); Republican Party of Minn. v. White, 536 U.S. 765 (2002)(held the judicial conduct provision at issue

burdened speech based on its "content" and it burdened "a category of speech" that is at the core of the First Amendment); Legal Services Corporation v. Velazquez, 531 U.S. 533, 548-49 (2001) (held the "Constitution does not permit the Government to confine litigants and their attorneys in this manner. We must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge.)."

Virtually every circuit has held the arbitrary denial of counsel from out-of-state without particularized findings violates the Sixth Amendment right to counsel. Fuller v. Diesslin, 868 F.2d 604, 611 (3rd Cir. 1989)(held "the trial court's wooden approach and its failure to make record-supported findings balancing the right to counsel with the demands of the administration of justice resulted in an arbitrary denial of Fuller's motion for counsel pro hac vice." Accord United States v. Panzardi Alvarez, 816 F.2d 813, 817 (1st Cir. 1987) (mechanistic application of local rule that permits district judge to arbitrarily deny defendant's request for counsel of choice requires reversal); United States v. Ries, 100 F.3d 1469 (9th Cir. 1997) cert. denied 117 S.Ct. 2526 (1997).

Second, defense counsel argues and cites to Giannini v. Real, 911 F.2d 354, 357-59 (9th Cir. 1990), where the Ninth Circuit held "local" district court rules that excluded out-of-state attorneys were "rational." This case is outdated because the facts and law have changed. Defense counsel also skips over Plaintiffs' Motion for Preliminary Injunction where this published contrary precedent was disclosed, along with the corroborating authority the case was facially flawed the day it was filed because it applied the outdated law that was superseded by Judicial Improvements and Access to Justice Act Pub.L. 100-

702, which became effective December 1, 1988.[7] The Ninth Circuit also got it wrong in applying a "rational basis" standard of review because the High Court in Frazier v. Heebe, 482 U.S. 641 (1987) applied a "rational and necessary" standard of review. This standard of review the Supreme Court applied, as noted above, was substantially heightened by Congress. If the standard of review was "rational" the High Court would not have invalidated the challenged local rules in Frazier v. Heebe.

This decision is also suspect because the government has argued to Congress that the

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[7] See Plaintiffs' Motion for PI p. 58-58 n. 9:

"Plaintiffs' counsel was the plaintiff in Giannini v. Real, 911 F.2d 354 (9th Cir. 1990) *cert. denied* 498 U.S. 1012, (1991). Plaintiff did not meet his burden of persuasion in that case that raised a similar local rule challenge. The facts developed and the legal arguments have changed dramatically since that decision over 15 years ago. More particularly, that case is facially flawed. It was decided on May 8, 1990, yet it cites the outdated law, as it existed prior to the 1988 amendments to 28 U.S.C. § 2071-72. See 911 F.2d at 360 where the Ninth Circuit, analyzes the issue under the Rules of the Supreme Court. Compare that to 28 U.S.C.A. § 2071 and the immediately following *Commentary on 1988 Revision* by the reporter David D. Siegel, p. 521:

> ". . .in the 1988 amendment and its reference to the Supreme Court in the second sentence was struck out and a reference to § 2072 substituted. The change . . .adopted with the district courts primarily in mind, requires rules promulgated on the authority of § 2071 to conform to the requirements of § 2072 instead of merely to rules promulgated by the Supreme Court."

This is a case where the Ninth Circuit in reaching its decision incorrectly applied an outdated law that had been expressly disavowed and rejected by Congress.

administration of justice process in the Ninth Circuit has already been compromised. See Exhibit Q ("The sheer size of the Ninth Circuit has led to serious administrative difficulties that have adversely affected its ability to render justice efficiently." See also Ninth Circuit Judge Diarmuid O'Scannlain testimony before the Senate Judiciary Committee that the Ninth Circuit is the "judiciary's 800 pound gorilla; and "If the Ninth Circuit Court of Appeals has not yet collapsed, it is certainly poised on the edge of a precipice." See Exhibit Q.

7. Conclusion

For all of the foregoing reasons, the challenged "local" rules, which are admittedly conjunctive with state law and disjunctive with national federal law, are unlawful under the Rules Enabling Act and Constitution. This Court has jurisdiction to declare and enjoin "local rules" of other Districts that violate the Rules Enabling Act and Constitution.

Plaintiffs request a preliminary injunction prohibiting the enforcement of any "local" district court rules that denies equal general admission privileges to non-forum state licensed attorneys, and authorizing plaintiffs and other sister-state attorneys to apply for general bar admission in federal district courts.

Dated: February 2, 2006

Respectfully submitted,

By: /s/ Joseph Robert Giannini

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Civil Action No.
05-cv- 5081 TON

UNITED STATES DISTRICT COURT FOR FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NAAMJP (National Association for the Advancement of Multijurisdiction Practice), John F. O'Rourke, Alan Ellis, Donald Harris.
Plaintiffs,

v.

George W. Bush, Alberto R. Gonzales, Hon. John W. Bissell, Chief Judge for the United States District Court for the District of New Jersey, Dennis M. Cavanaugh, Joseph A. Greenway, Jr., Katharine S. Hayden, Faith S. Hochberg, Jose L. Linares, William J. Martini, Joel A. Pisano, Alfred M. Wolfin, Hon. Consuelo B. Marshall, Chief Judge of the United States District Court for the Central District of California, Percy Anderson, Terry J. Hatter, Jr., Ronald S.W. Lew, Nora M. Manella, Howard A. Matz, James S. Otero, Dean D. Pregerson, George P. Schiavelli, Christina A. Snyder, John F. Walter, United States Department of Justice, Anthony J. Scirica, Chief Judge of the Third Circuit Judicial Council, Dolores K. Sloviter, Jane R. Roth, Theodore A. McKee, Marjorie O. Rendell, James T. Giles, Thomas Vaniske, Sue L. Robinson, Doretta W. Ambrose, Garrett Brown Jr., Douglas B. Ginsburg, Chief Judge of the District of Columbia Judicial Council, David B. Sentelle, Karen Lecraft Henderson, A. Raymond Randolph, Judith W. Rogers, David S. Tatel, Merrick B. Garland, Thomas F.

Hogan, Emmet G. Sullivan, James Robertson, Richard W. Roberts, Ellen Segal Huvelle, Reggie B. Walton

FIRST AMENDED COMPLAINT – CLASS ACTION - DECLARATORY & INJUNCTIVE RELIEF FRCP 23(b)(2)

Introduction

1. The Constitution under Article I § 8 authorizes Congress to enact the laws necessary and proper for carrying into execution its enumerated powers. Congress, in the Rules Enabling Act, 28 U.S.C. § 2071 *et. seq.*, authorizes the District Courts to prescribe rules of practice and procedure for the conduct of their business. 28 U.S.C. § 2071(a). Congress, however, spelled out that power to prescribe rules of practice and procedure to the following narrow conditions. First, such "local" rules shall be consistent with Acts of Congress. Ibid. Second, such "local" rules shall be consistent with the *national* rules of practice and procedure. Ibid. Third, such "local" rules shall not abridge, modify, or enlarge any substantive right. 28 U.S.C. § 2072(b). Fourth, all laws in conflict with such *national* rules shall be of no further force or effect. Ibid.

2. Plaintiffs herein challenge, on its face and as applied, on behalf of themselves and others similarly situated in a representative capacity, the "local' rules of approximately 55 federal district courts that categorically, regardless of individual merit or federal practice experience, deny *general* bar admission privileges to attorneys licensed in a sister-state other than the one in which the federal district court sits.

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3. Plaintiffs assert these challenged "local" rules are: (i) inconsistent with numerous Acts of Congress, including the Bill of Rights; (ii) not consistent with the national rules of practice and procedure, including FRAP 46 and Supreme Court Rule 5; and (iii) abridge, modify, and enlarge numerous federal substantive rights. Plaintiffs request these challenged "local" rules be declared a nullity and of no force and effect. Plaintiffs further allege these challenged "local" rules are overbroad, constitute facial unlawful viewpoint discrimination, implicate and violate the First Amendment rights to speech, advocacy, expressive association, petition for redress of grievances, the Supremacy Clause, the constitutional right to travel, the constitutional norm of comity, the 6th Amendment right to counsel, and the 5th Amendment rights to due process and equal protection. Plaintiffs request preliminary and permanent injunction barring their enforcement.

Jurisdiction

4. Jurisdiction is provided by 28 U.S.C. § 1331 for cases arising under the Constitution and laws of the United States, and 28 U.S.C. § 1343(a)(3) deprivation of privileges and immunities.

Parties

5. Plaintiffs are the NAAMJP (National Association for the Advancement of Multijurisdiction Practice), a nonprofit corporation, incorporated in California with offices in Los Angeles County, doing business nationally. The NAAMJP is a nonprofit public

benefit corporation whose primary purpose is to bring to life the ABA MJP Commission Recommendations. Plaintiff NAAMJP sues on its own behalf, and the individual and collective members thereof. Plaintiff John O'Rourke is an individual and an award-winning patent attorney licensed in Pennsylvania and residing in Southern California. Plaintiff O'Rourke's patent property practice, similarly to others in the intellectual property field, transcends numerous state lines and is regional and national in scope. Plaintiff Alan Ellis is a national federal criminal defense specialist with offices in Philadelphia, Pennsylvania, and California. Plaintiff is nationally known and recognized as one of the leading experts in federal criminal trial practice. Plaintiff Donald Harris is an attorney with a national practice specializing in bankruptcy law with offices in Ohio. Plaintiff Donald Harris is recognized as an expert in bankruptcy practice and procedure. Plaintiffs John O'Rourke, Alan Ellis, and Donald Harris bring this lawsuit as individuals and also as members of the NAAMJP. Plaintiffs allege the challenged local rules violate both their rights to serve as counsel, as well as their individual right to counsel of choice, in a designated federal public forum on matters of public concern. Plaintiffs further sue on behalf of others similarly situated in a class action representative capacity.

6. Defendants George W. Bush and Alberto R. Gonzales are sued in their official capacity as President and Attorney General. These United States officials have taken an oath of office to faithfully execute the laws and to the best of their ability to "preserve, protect and defend the constitution of the United States." The PREAMBLE to the Constitution informs its purpose to "form a more perfect Union, establish

justice, and secure the blessings of liberty." Plaintiffs allege these non-delegable Executive Office constitutional duties are being trampled by the challenged "local' rules. President Bush is further named as a defendant because plaintiffs allege it is a fundamental betrayal of his public trust as President and Commander in Chief, to send American men and women off to Afghanistan and Iraq to risk life and limb for world democracy, and then to have these same men and women return to America, often maimed and scarred and forgotten, wherein they will be denied the full and equal privileges and liberties of American citizenship by the challenged federal district court "local" rules. Plaintiffs allege the Honorable Attorney General Gonzales is named as a defendant because he has an affirmative non-delegable duty not to facilitate, shield, and assist the usurpation of the Bill of Rights and Congressional powers by the judicial branch in the guise of "local" practice and procedural rules.

7. Defendants are the Hon. John W. Bissell, Chief Judge of the United States District Court for the District of New Jersey, and District of New Jersey Judges, the Honorable Dennis M. Cavanaugh, Joseph A. Greenway, Jr., Katharine S. Hayden, Faith S. Hochberg, Jose L. Linares, William J. Martini, Joel A. Pisano, and Alfred M. Wolfin. These government officials are being sued in their official capacity, as rule-makers, and enforcers of "local" rules, alleged to be unlawful and in excess of authorized discretion.

8. Defendants are the Department of Justice which has a duty to enforce the Rules Enabling Act: and the Hon. Anthony J. Scirica, Chief Judge of the Third Circuit Judicial Council, Dolores K. Sloviter, Jane R. Roth, Theodore A. McKee, Marjorie O. Rendell, James T. Giles, Thomas Vaniske, Sue L. Robinson,

Doretta W. Ambrose, Garrett Brown Jr., members of the Third Circuit Judicial Council. Plaintiffs allege the Judicial Council members have a statutorily prescribed under 28 U.S.C. § 332 (d)(4) continuing periodic supervisory responsibility and duty to review all District Court "local" rules within each circuit to ensure their conformity with 28 U.S.C. §§ 2071-72. Plaintiffs allege a Department of Justice and Judicial Council breach of duty and injury.

9. Defendants are the Hon. Consuelo B. Marshall, Chief Judge of the United States District Court for the Central District of California, and Central District of California Judges, the Honorable Percy Anderson, Terry J. Hatter, Jr., Ronald S.W. Lew, Nora M. Manella, Howard A. Matz, James S. Otero, Dean D. Pregerson, George P. Schiavelli, Christina A. Snyder, John F. Walter, and Steven v. Wilson. These government officials are being sued in their official capacity, as rule-makers, and enforcers of "local" rules alleged to be unlawful, and in excess of authorized discretion.

10. Defendants are the Hon. Mary M. Schroeder, Chief Judge of the Ninth Circuit Judicial Council, Arthur Alarcon, Alex Kozinski, Kim McLane Wardlaw, Marsha Berzon, Andrew J. Kleinfeld, B. Lynn Winmill, Stephen M. McNamee, Terry J. Hatter, Charles R. Breyer, Roger G. Strand, members of the Ninth Circuit Judicial Council. Plaintiffs allege the Judicial Council members have a statutorily prescribed under 28 U.S.C. § 332 (d)(4) continuing periodic supervisory responsibility and duty to review all District Court "local" rules within each circuit to ensure their conformity with 28 U.S.C. §§ 2071-72. Plaintiffs allege a breach of this duty and injury.

11. Douglas B. Ginsburg, Chief Judge of the

District of Columbia Judicial Council, David B. Sentelle, Karen Lecraft Henderson, A. Raymond Randolph, Judith W. Rogers, David S. Tatel, Merrick B. Garland, Thomas F. Hogan, Emmet G. Sullivan, James Robertson, Richard W. Roberts, Ellen Segal Huvelle, Reggie B. Walton, members of the District of Columbia Court of Appeals Judicial Council. Plaintiffs allege the Judicial Council members have a statutorily prescribed under 28 U.S.C. § 332 (d)(4) continuing periodic supervisory responsibility and duty to review all District Court "local" rules within each circuit to ensure their conformity with 28 U.S.C. §§ 2071-72. Plaintiffs allege a breach of this duty and injury.

Class Action Allegations

12. Plaintiffs allege the class that they seek to represent consists of the approximately one million attorneys in the United States that have earned a law degree from an American Bar Association accredited law school, and have been admitted to the bar of either the United States Supreme Court or a State Supreme Court. This class is categorically ineligible for general bar admission privileges in approximately 55 federal district courts. The class plaintiffs seek to represent also includes the American citizens who desire to retain these attorneys as counsel in the United States District Courts.

13. Plaintiffs allege this lawsuit is properly maintainable as a class action under FRCP 23 because of the tens of thousands of individual attorneys and American citizens, affected by each of the district courts' challenged "local" general bar admission rules — is impracticable. The joinder and adjudication with respect to the numerous individual members of the

class as a practicable matter would also be dispositive of the interests of the others not parties to the adjudications, or substantially impair or impede their ability to protect their interests. The filing and prosecution of numerous separate actions would also result in a waste of government and judicial resources, and would further create a risk of inconsistent and incompatible standards and decisions.

14. Plaintiffs allege this lawsuit is properly maintainable as a class action under FRCP 23 because it presents common questions of law and fact. Moreover, plaintiffs allege the present hodge-podge of inconsistent and incompatible federal district court general bar admission standards they are presently subject, which has been referred to as a "minefield" by a United States Judicial Conference study, warrants class action status so that a common uniform national standard is adopted. Plaintiffs allege a common uniform standard is compelled under the Rules Enabling Act.

15. Plaintiffs allege this lawsuit is properly maintainable as a class action under FRCP 23 because it presents typical claims and defenses of the class at large as to both the plaintiffs and the defendants. Plaintiffs allege the government's claims and defenses as to the propriety of challenged local federal district court rules in the District of New Jersey, Central District of California, and the District of Columbia are typical of all of the United States District Courts that categorically discriminate in general bar admission privileges regardless of individual merit. Plaintiffs allege their claims as federal practice attorneys and or/citizens are typical of other attorneys and citizens. Plaintiffs allege the defendants named in this Class Action Complaint are typical of the claims and defenses of the other members of the multiple United States

Judicial Councils and District Courts, who are not named as defendants.

16. Plaintiffs can adequately represent the class. Plaintiffs have national practices and are experts in the specialized federal fields of patents, copyrights, bankruptcy, federal criminal defense, and immigration. Plaintiffs' specialized federal specialties more than adequately represent the federal practice macro. Named Plaintiffs as citizens also have a sufficient stake in the outcome because they are injured by being denied their collateral right to counsel, and they have zealously sought to vindicate their federal rights by this proceeding. Named Plaintiffs do not have interests antagonistic with the class because plaintiffs are only seeking declaratory and injunctive relief, and not monetary damages.

17. Plaintiffs' counsel is qualified to conduct this litigation as 1983 graduate of Temple University School of Law, and a member of the bar of this Court. Plaintiffs' counsel is experienced in federal litigation and MJP litigation. Plaintiffs' counsel is more than able to conduct this litigation.

Venue

18. Venue is founded in this Eastern District, which is also the headquarters for the United States Court of Appeals for the Third Circuit, under 28 U.S.C. §1391(b)(2) "a judicial district in which a substantial part of the events or omissions occurs giving rise to the claim." Plaintiffs allege venue is also appropriate in this federal court because plaintiffs are categorically disqualified from bringing this suit by the challenged local attorney admission rules of the District of Columbia and the Central District of California.

Factual Allegations

19. The American Bar Association has consistently been a friend and trusted advisor on national issues pending before the federal courts, including compensation of judicial officers, judicial independence, sentencing guidelines, and in developing the Rules of Professional Conduct. The American Bar Association Conference of Delegates in 1995 passed Resolution #8 that declares the failure of district courts to provide reciprocal bar admission to out-of-state attorneys drives up the costs of litigation and disserves the integrity of the bench and bar, and should be changed. The United States Supreme Court has recognized that the ABA standards and guidelines are the benchmark for reasonableness.

20. In the last 10 years, with the advent of the 21st Century and Information Age with electronic filing and internet access on the world-wide web, PACER, CM/ECF, and 24/7 access to the district court dockets, there has been a revolution in communication. Recognizing this revolution, the ABA's MJP Commission was staffed by leading lawyers from around our nation. They conducted nationwide hearings and received comments from virtually every arm of the bar concerning reciprocal admission and discipline, among other matters. The ABA MJP Commission, in its report Client Needs in the 21st Century, and based on a careful and meticulous study, determined the best method to measure competence is actual experience practicing law. See www.abanet.org/cpr/mjp **Report 201G** "RESOLVED, that the American Bar Association adopts the proposed *Model Rule on Admission by Motion*, dated August 2002." The ABA MJP web site indicates that 35 states have adopted the

ABA MJP Model Rule for Admission on Motion that was enacted as a result of this study.

21. Paralleling this ABA MJP Commission report, "local" rules governing bar admission were studied extensively in 1995 at the request of the Standing Committee. Marie Leary of the Federal Judicial Center prepared an extensive report entitled "Eligibility Requirements for, and Restrictions on, Practice before the Federal District Court," November 7, 1995, ("Leary Report") *Working Papers of the Committee on Rules and of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct* 125-182 (Administrative Office of the United States Courts 1997). This report is quoted and referenced in Moore's Federal Practice, *infra*.[8]

22. Moore's Federal Practice 3rd Ed., Judith A. McMorrow and Daniel R. Coquillette, "The Federal Law of Attorney Conduct," § 801.20(3) Criteria for General Admission, p. 801-56 states:

According to the "Leary Report" .....

> This extraordinary diversity of bar requirements was almost completely random in terms of characteristics of the district courts, with rural districts and urban districts; districts on tropical islands; western, southern, northern and eastern districts; and large and small districts all showing no particular predilection for any model. The primary justification for divergent local rules, special needs inherent to a

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[8] Plaintiffs request leave to depart from customary notice pleading and cite to appropriate precedent when necessary to establish the government's position is not substantially justified.

particular district, appeared to be almost completely lacking. Indeed, because many of these local rules were adopted before the 1988 revision to 28 U.S.C. § 2071(b) requiring "appropriate public notice and comment," there is little in the record of why individual courts chose the model they did.

23. Moore's Federal Practice 3rd Ed., Judith A. McMorrow and Daniel R. Coquillette, "The Federal Law of Attorney Conduct," § 801.20(7) p. 801-59 states, "The federal local rules governing attorney admissions are a minefield of inconsistent requirements, almost entirely unrelated to the actual characteristics of any particular type of district." Moreover, the balkanized local rules are "a hardship for Department of Justice attorneys, and other government attorneys, a hardship that has been emphasized by Representatives of the Department of Justice." § 801.20(6) p. 801-58.

24. The Bankruptcy Commission, authorized by the Bankruptcy Act of 1994, has recommended a national bar for bankruptcy cases. The Bankruptcy Commission argued there is no reason why bankruptcy should be localized, dealing as it does with a uniform federal system. Id. at p. 801-59, 60.

25. These challenged quota-based "local" rules provide a crazy quilt pattern that is even more burdensome ten years after the "Leary Report" because of the ABA MJP Commissions recommendation for admission on motion for experienced attorneys that increases the inconsistent minefield by putting federal First Amendment protected wine in State antiquated bottles.

26. Plaintiffs are irreparably injured, and their First Amendment rights and those of others, are being

frozen because of the hodge-podge of "local" attorney admission rules that are a minefield of inconsistency. For example, the 3rd Circuit Judicial Council, as noted above, has a supervisory responsibility under 28 U.S.C. § 332 (d)(4) to review all District Court "local" rules within the circuit to ensure their conformity with 28 U.S.C. §§ 2071-72. The local rules in the 3rd Circuit district courts are all over the place and the product of unbridled and unsupervised licensing discretion. District of New Jersey Local Rule 101(b) limits general admission to New Jersey licensed lawyers. New Jersey has rejected the ABA Model Rule for admission on motion. An out-of-state attorney is compelled to accept the markedly inferior *pro hac vice* admission available, and has to pay bar annual bar dues to the State of New Jersey as long as he is appearing in the federal case for this second class status. Local Rule 101(c). Moreover, her client has to pay two lawyers in the District of New Jersey to perform services that could be more efficiently and expeditiously performed by one federal practice specialist.

27. In contrast, with the NJ local rule licensing fees payable to the State of New Jersey Lawyers' Fund for Client Protection for second class federal privileges — a licensing tax that is not authorized by Congress — Western District of Pennsylvania LR 83.2.1 C authorizes general admission to "Any person who is a member in good standing of the bar of the Supreme Court of Pennsylvania, or a member in good standing of the Supreme Court of the United States, or a member in good standing of any United States district court, may be admitted to practice before the bar of this court." Approximately 1/3 of the federal district courts have admission rules paralleling the Western District of Pennsylvania.

28. In further contrast, the Eastern District of Pennsylvania limits general admission to Pennsylvania licensed attorneys. The State of Pennsylvania, however, has adopted Pennsylvania Bar Admission Rule 204, an admission on motion provision for States that provide reciprocity to Pennsylvania attorneys. Attorneys from 18 states are categorically denied admission on motion to the Pennsylvania Supreme Court because these states do not grant Keystone State lawyers the same reciprocal privilege. Thus these lawyers are vicariously disqualified from general admission on motion in the Eastern District of Pennsylvania, based on the State of Pennsylvania's "horse-trading" incorporated by the local rules of the Eastern District of Pennsylvania. The wasted costs in time and money attributable to requiring expert federal practice specialists to satisfy the unbridled whim of local State licensing officials is a virus that poisons our liberties and castrates our First Amendment freedoms.

29. The apex of federal delegation of jurisdiction and a non-delegable federal duty is found in the four federal district courts in California. Each of these federal district have blindly and entirely assigned their bar admission duties to the State Bar of California without providing any standards or guidelines.

30. Moreover, to gain the privilege of federal admission, experienced out-of-state attorneys are compelled to take the State of California's entirely subjective bar exam. The costs in time and money are an overwhelming hardship and a significant deterrent. This popularity contest, which is incorporated by reference in the four federal district courts in California, consists of 6 one-hour essay questions that are primarily on *general* principles of law, and 2 three-hour performance tests wherein the experienced sister-

state attorney is compelled to write his opinion in a memorandum of law. If one flips a coin, the probability is that .5 of the time it will be heads and .5 of the time it will be tails. Rand Corporation statistical analyses exam after exam establish these subjective tests are less reliable than .5. These test results by definition are "junk science" because the results are less reliable than flipping a coin. These test results are not even admissible into evidence in the federal courtroom under Daubert and the Federal Rules of Evidence 700 series.

31. The mischief from this minefield of balkanized local rules is "a house divided against itself." Members of the bar who are received into that ancient fellowship for something more than private gain, and like the Court itself are instruments of justice, are subject to territorial "horse-trading" where local licensing officials are authorized unbridled licensing discretion. The challenged "local" rules reinforce and buttress these State imposed territorial tariffs on the American people's First Amendment rights. These federal "local" rules further insulate State segregationist policies from independent federal judicial review, as this case make clear, because they wall off experienced attorneys from out-of-state seeking to champion locally unpopular causes and put "duct tape" over their mouths when seeking to vindicate federal rights in the federal courtroom.

32. The antiquated nature of the challenged balkanized "local" attorney admission rules can be further illustrated by the 21st Century standards in other leading nations. In the European Union, for example, an attorney licensed in France can set up shop in Germany and vice versa. The same holds true in the Canadian provinces wherein the right to travel and petition are mutually reinforcing. Likewise, the United

States is also a member of the World Trade Organization, and it has signed GATS (the General Agreement in Trade in Services). GATS' requires that licensing regulations may not be "more burdensome than necessary to ensure the quality of the service or ensure a legitimate objective." Lawyers licensed in foreign countries now have greater free trade rights than sister-state attorneys have under the Bill of Rights and the challenged "local" rules.

First Cause of Action – National Rules of Practice and Procedure Violation of 28 U.S.C. § 2071, § 2072, § 332(d)(4)

33. As noted above, the Standard of Review for local rules is as follows. First, such "local" rules shall be consistent with Acts of Congress. Ibid. Second, such "local" rules shall be consistent with the *national* rules of practice and procedure. Ibid. Third, such "local" rules shall not abridge, modify, or enlarge any substantive right. 28 U.S.C. § 2072(b). Fourth, all laws in conflict with such *national* rules shall be of no further force or effect. Ibid.

34. The federal right to counsel in the federal courts stems from the First, Fifth, Sixth, and Seventh Amendments and is statutorily authorized by *28 U.S.C. § 1654. Appearance personally or by counsel*, "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

35. Federal Rule of Appellate Practice 46 and Supreme Court Rule 5 are national rules of practice and procedure enacted under the national rule-making standards of 28 U.S.C. § 2072. Both of these national

rules were ratified by Congress. These national rules implicate directly and indirectly the right to counsel. FRAP 46 and Supreme Court Rule 5 provides general bar admission privileges to all sister-state attorneys in good standing.

36. The challenged "local" rules of the Central District of California and District of New Jersey (and other parallel challenged district court local rules) that categorically deny reciprocal general admission regardless of individual merit are unlawful because they modify, abridge, and enlarge the right to counsel as prescribed by the national rules. They are further inconsistent with the national rules as Congress has never approved discrimination in federal bar admission based on state licensure. The right to counsel is further a substantive right. The local rules are inconsistent with FRAP 46 and Supreme Court Rule 5, and they violate that substantive right because they enlarge the rights of forum state attorneys to appear as counsel, and they modify and abridge the rights of non-forum state attorneys to serve as counsel. The rights of all America citizens are, therefore, modified by these local rules.

37. Likewise, 5 U.S.C. § 500(b) is an Act of Congress that provides all licensed American attorneys in good standing are authorized to appear as counsel before federal administrative agencies. The challenged local rules are inconsistent with 5 U.S.C. § 500(b) because an attorney is qualified by this Act of Congress to serve as counsel for a party in the federal administrative agencies, and by other Congressional Acts in the federal appellate courts (FRAP 46), the U.S. Supreme Court (Rule 5) – but not under the challenged local rules. The rights of all America citizens are modified by these local rules. These local rules further

provide monopolies to local attorneys. Monopoly protection is not a legitimate governmental interest.

38. Additionally, Federal Rule of Civil Procedure 82 is a national rule of practice and procedure enacted under the national rule-making standards provided by 28 U.S.C. § 2072. FRCP 82, in pertinent part provides, "These rules shall not be construed to extend or limit the jurisdiction of the United States District Courts." Many areas of federal law are expressly and exclusively federal and have little to do with state law, including patents, copyrights, federal criminal defense, admiralty, and bankruptcy. The challenged local rules are inconsistent with FRCP 82, because by categorically piggy-backing forum state law that has nothing to do with federal law, they limit the jurisdiction of the United States District Courts to the forum State Courts. Plaintiffs, as federal practice specialists, are injured because their federal right to appear as counsel in the federal courtroom and to retain counsel is chained to state law.

39. Additionally, Federal Rule of Civil Procedure 1 is a national rule of practice and procedure enacted under the national rule-making standards provided by 28 U.S.C. § 2072. FRCP 1, in pertinent part provides, "These rules govern the procedure in the United States District Courts....They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." Consistent with FRCP 1, is the well established federal law that holds the constitutional right to "free expression," that a law is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content or subject matter of their speech. The challenged local rules, as announced by the American Bar Association Recommendation 8 (1995)

are unjust. They abort the right to counsel by limiting the availability of out-of-state counsel. They delay and increase the costs of federal litigation by making a client pay two attorneys for one service. And they make duplicate and triplicate State bar admission for federal practice specialists an expensive and time-consuming minefield.

40. The Federal Rules of Evidence are national rules enacted under the national rule-making standards provided by 28 U.S.C. § 2072. FRE 102 tracks FRCP 1. FRE 102 requires the "elimination of unjustifiable expense and delay ... to the end that truth may be ascertained and proceedings justly determined." The local rules by walling off attorneys from other states, presume either that out-of-state attorneys are unethical or incompetent. This presumption is inconsistent with the self-evident truth that all men are created equal. If a citizen is presumed to know the law regardless of where he or she lives and is authorized to represent himself in the federal courtroom regardless of where he or she lives, it is fantasy to presume an experienced federal practice specialist does not know the law. Truth is not served by darkness and nailing the doors shut to free access to the federal courtroom.

41. Likewise, Article V Privileges, Rule 501 provides, in pertinent part, "...the privilege of a person, witness...shall be interpreted by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." It is well established law that: (i) attorneys and clients have an attorney-client privilege; (ii) the opportunity to practice law is a constitutionally protected privilege and immunity; and (iii) the people's rights to petition the government is a constitutionally protected privilege and immunity. The challenged "local" rules are

inconsistent with the federal rules of privilege as interpreted by the United States courts, and they modify, abridge, and enlarge the privileges and immunities of citizenship by departing from a color blind constitution.

42. Plaintiffs allege the district courts may not, under the guise of its local rule-making power, impose the sort of substantive restraints challenged herein. Plaintiffs allege the challenged local rules are not the kind of details delegated in their rule-making authority, and they are a nullity because their adoption as federal law falls outside the local rule-making authority of the district courts.

Second Cause of Action
Violation of the First Amendment Overbreadth Doctrine

43. The preceding allegations are incorporated herein.

44. The First Amendment rights are not subject to a majority vote as has occurred with the adoption of the local rules, and they are thus unlawful.

45. The challenged local rules are an enormous prior restraint. Plaintiffs and other American citizens' First Amendment freedoms to advocate, assembly, and petition are being suppressed across our Union and in many cases suffocated by this prior restraint.

46. When a court decides to impose a speech-restrictive injunction, the conclusions it reaches must be "supported by findings that adequately disclose the[ir] evidentiary basis . . ., that carefully identify the impact of [the defendants'] unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity."

NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933-34 (1982). There is neither an evidentiary basis nor a judicial finding of unlawful conduct, as the "Leary Report" verifies, against non-forum state attorneys that would serve to justify the suppression of their First Amendment liberties via the "local" rules prior restraint.

47. The defendants cannot justify this significant federal restraint and discrimination in a designated public forum. They do not have a compelling need because federal law and procedure are uniform. Monopoly protection is not a legitimate government interest. The challenged local rules are not narrowly tailored because the U.S. Supreme Court, U.S. Courts of Appeals, and approximately 1/3 of the U.S. District Courts do not censor out-of-state attorneys or put up fences around their courtroom. Moreover, reciprocal admission on motion is the norm in 35 states. Reciprocal discipline is the norm in both the State and federal courts.

48. The District Courts can protect their interests in the administration of justice process through "less restrictive means" than categorical exclusion of citizen-attorneys licensed in other states.

49. Enforcement of the local rules would a violation of the overbreadth doctrine.

Third Cause of Action
"Viewpoint Discrimination"

50. The preceding allegations are incorporated herein. These challenged "local" attorney only admission rules are quintessential viewpoint discrimination. Only "local" attorneys are permitted to freely speak, freely represent their client and engage in

expressive association, or freely petition for redress of grievances in a designated national public forum on matters of public concern.

51. Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or it's content. Police Department of Chicago v. Mosley, 408 U.S. 92, 95 (1972). A regulation that denies one group of citizens the right to address a selected audience on controversial issues of public policy is plainly viewpoint discrimination. Consolidated Edison Co. v. Public Serv. Comn'n, 447 U.S. 530, 546 (1980).

52. Viewpoint discrimination is a particularly egregious form of content discrimination. It is presumptively unconstitutional. Our government is prohibited from favoring one viewpoint over another. See Rosenberger v. Rector And Visitors of Univ. of VA, 515 U.S. 819 (1995)(Holding that although it may regulate the content of expression when it is the speaker or when it enlists private entities to convey its own message, the University may not discriminate based on the viewpoint of private persons whose speech it subsidizes even when the subject is religion). "To permit one side of a debatable public question to have a monopoly in expressing its views . . . is the antithesis of constitutional guarantees." Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175-176 (1976). "A law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official." Lakewood v. Plain Dealer Publishing Co, 486 U.S. 750, 763 (1988).

Fourth Cause of Action
Violation of Supremacy Clause

53. The preceding allegations are incorporated herein.

Fifth Cause of Action
Violation of Constitutional Norm of Comity

54. The preceding allegations are incorporated herein.

Sixth Cause of Action
Violation of Constitutional Right to Travel

55. The preceding allegations are incorporated herein.

Seventh Cause of Action
Violation of First Amendment Right to Free Speech

56. The preceding allegations are incorporated herein.

Eighth Seventh Cause of Action
Violation of First Amendment Right to Free Speech/Compelled Speech

57. The preceding allegations are incorporated herein.

Ninth Cause of Action
Violation of First Amendment Right to Expressive Association

58. The preceding allegations are incorporated herein.

Tenth Cause of Action
Violation of First Amendment Right to Petition

59. The preceding allegations are incorporated herein.

Eleventh Cause of Action
Violation of Sixth Amendment Right to Counsel

60. The preceding allegations are incorporated herein.

Twelfth Cause of Action
Violation of 5th Amendment Equal Protection

61. The preceding allegations are incorporated herein.

Thirteen Cause of Action
Violation of 5th Amendment Due Process

62. The preceding allegations are incorporated herein.

63. It is well settled no man can be a judge in his own case. The judicial defendants have an across the board conflict of interest because they are both rule-makers and adjudicators.

64. The Department of Justice has a conflict of interest because it has both a duty to defend the law, and to defend the United States judicial branch.

65. This conflict of interest is a due process

violation that injures plaintiffs.

Wherefore, the Plaintiffs request the following relief:

1. A declaratory judgment holding that "local" district court attorney admission rules that deny general admission privileges to non-forum state licensed attorneys are unlawful.

2. A preliminary injunction and a permanent injunction prohibiting the enforcement of any "local" district court rules that denies general admission privileges to non-forum state licensed attorneys.

3. Costs.

4. Attorney fees under the Equal Access to Justice Act.

5. Any other relief the Court deems warranted.

Dated: December 12, 2005
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IN THE SUPREME COURT
OF THE STATE OF ARIZONA

In the Matter of PETITION TO AMEND RULE 38(a), ARIZ. R.S.Ct.,

Petition to Amend Rule 38(a)

Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the United States Attorney for the District of Arizona, on behalf of the United States of America, hereby petitions the Court to amend Supreme Court Rule 38(a) for the reasons that follow.

I. SUMMARY OF PROPOSED CHANGES AND GROUNDS THEREFOR

A. As currently written, Rule 38(a) obligates all out-of-state (nonresident) attorneys, *inter alia,* to complete an application to appear *pro hac vice,* to pay "a non-refundable application fee equal to 85% of the current dues paid by active members of the State Bar of Arizona for the calendar year in which such application is filed," and to associate with a local attorney who is a member in good standing of the State Bar of Arizona, before they may appear before an Arizona State court, board or administrative agency. *See S.* Ct. R. 38(a)(2), & (3)(A). No exception is recognized for attorneys appearing on behalf of the United States Government. Rule 3 8(a) thus affects all nonresident Department of Justice attorneys who are sent by the United States Attorney General to attend to the interests of the United States in Arizona State courts, boards, and administrative agencies.

This rule imposes a substantial burden on the

United States and its attorneys, and we believe that its imposition against the Federal Government's representatives is unauthorized. We therefore propose a rule amendment that would expressly exempt attorneys appearing in Arizona solely for the purpose of representing the interests of the United States from the requirement of applying for admission *pro hac vice*, paying any application fee, and associating with local counsel.

B. The U.S. Attorney General has the authority by federal statute to assign any officer of the Justice Department to appear on behalf of the United States in any legal proceeding in the United States, so long as that attorney is duly licensed and authorized to practice as an attorney under the laws of at least one state, territory, or the District of Columbia. *See* 28 U.S.C. §§ 515-519, 530C(c)(1), 547. By conditioning the participation of Federal Government Attorneys in Arizona legal proceedings upon securing *pro hac vice* admission to practice, Rule 38(a) conflicts with the Attorney General's federal statutory authority to send attorneys to any court in the United States - state or federal - to protect the interests of the United States. *See* 28 U.S.C. § 517 (the Attorney General may send "any officer of the Department of Justice ... to any State ... to attend to the interests of the United States in a suit pending in a court of ... any State, or to attend to any other interest of the United States.").

Attorneys sent by the Attorney General to represent the interests of the United States are themselves vested with nationwide authority - by clear statutory authorization, they may conduct "any kind of legal proceeding" in which the United States is

concerned, regardless of whether they reside in the state in which the proceeding is brought. 28 U.S.C. §§ 515(a), 547.

Under the Supremacy Clause of the United States Constitution, the activities of federal officers and agents carrying out their duties on behalf of the United States are free from direct state regulation, except where Congress has expressly provided otherwise. *See, e.g., Goodyear Atomic Corp. v. Miller, 486 U.S.174,180-181(1988); Hancock v. Train, 426 U.S.167,178-179 (1976); James Stewart & Co. v. Sadrakula, 309 U.S. 94,103-104 (1940).*

This principle has long been an established part of our law. Thus, in *Cunningham v. Neagle,135 U.S. l, 62-63 (1890),* the Supreme Court made clear that a California sheriff could not interfere with a U.S. Marshal carrying out his duties to protect the safety of federal officials. The Court explained the constitutional underpinnings of its ruling: "The United States is a government with authority extending over the whole territory of the Union, acting upon the states and upon the people of the states. While it is limited in the number of its powers, so far as its sovereignty extends, it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the constitution, obstruct its authorized officers against its will, or withhold from it for a moment the cognizance of any subject which that instrument has committed to it." Id. at *62.*

Moreover, the Supreme Court has in various circumstances held that the states cannot regulate the activities of the Federal Government without clear

Congressional authorization. For instance, in *Sperry v. Florida, 373 U.S. 379 (1963)*, the Court ruled that Florida could not enjoin an individual from preparing and prosecuting patent applications within the state on the ground that the individual was engaging in the unauthorized practice of law under state law. The Court reasoned that, "since patent practitioners are authorized to practice only before the Patent Office, the State maintains control over the practice of law within its borders *except to the limited extent necessary for the accomplishment* of *federal objectives.*" *Id. at 402* (emphasis added).

The Supreme Court has also made clear that the United States is exempt from stateimposed administrative fees when performing a governmental function. *See Mayo v. United States, 319 U.S. 441, 447 (1943).* In *Mayo,* a Florida state law required that all bags of commercial fertilizer sold or distributed in the state bear a stamp indicating that an inspection fee had been paid. The U.S. Department of Agriculture, as part of a national soil conservation program, distributed to consumers in Florida bags of fertilizer that had been purchased outside the state, but did not bear the state-required inspection fee stamps. Florida objected. The Supreme Court found that the United States was acting in its governmental capacity by promoting soil conservation through distribution of fertilizer and that Congress had not authorized state taxation of federal instrumentalities; the Court therefore held that requiring the United States to pay the state inspection fees was prohibited by the Supremacy Clause.

In so holding, the Supreme Court distinguished *Graves v. People of State of New York ex rel. O Keefe,*

306 U.S. 466 (1939), in which an employee of a federal agency sought exemption from the New York state income tax on the theory that a tax upon his salary imposed an unconstitutional burden upon the Federal Government. The Court in *Graves* held that the economic burden of a state income tax was not a burden on the United States, and that the employee was not "clothed with the implied constitutional tax immunity of the government." Id. at *486. By* contrast, the Court in *Mayo* held that the proposed state inspection fees would be charged directly to the United States, and effectively constituted "money exactions the payment of which, if ... enforceable, would be required before executing a function of government," and hence were "prohibited by the Supremacy Clause." *Mayo, 319 U.S.* at *447.*

C. Although *pro hac vice* application fees are imposed upon individual attorneys, it is the policy of the Department of Justice to reimburse such fees to its attorneys who are required to pay fees in order to appear in state courts on behalf of the United States. The rationale for this policy is that, unlike regular admission to the bar of a court, a *pro hac vice* admission for a government attorney representing the interests of the United States in a particular case does not accrue to the personal benefit of the individual attorney, but benefits only the United States by enabling the attorney designated by the Attorney General to represent it in the matter at hand.

Under the Supreme Court's *Mayo* analysis, then, the fee requirement of Rule 38(a), although ostensibly imposed upon an attorney representing the interests of the United States, is in reality a charge against the

United Stat[illegible] It is therefore a "money exaction[] the payment o[illegible]hich ... would be required before executing a function of government," and accordingly is prohibited by the Supremacy Clause.[1] *See Mayo*, 319 U.S. at 447.

D. As noted earlier, Rule 38(a) also requires that a *pro hac vice* applicant associate with "local counsel" - whose name must appear on all documents filed in the case, and who "may be required to personally appear and participate in pretrial conferences, hearings, trials, or other proceedings conducted before the court, board or administrative agency when the court, board or administrative agency deems such appearance and participation appropriate." Rule 38(a)(2).

Such requirements - which place considerable time obligations on the associated local counsel, as well as a duty to remain knowledgeable about the legal issues and details of a case - can impose a significant burden on already stretched Federal Government resources. They require the Attorney General to double-staff cases that are, for valid administrative reasons, being handled outside the office of the United States Attorney for Arizona. For example, because of their subject matter calling for specialized expertise, certain cases are assigned for handling to attorneys at Department of Justice headquarters in Washington, D.C.; in other cases, proper resource allocation might demand such an assignment. And, in some situations, the U.S. Attorney's Office might be recused from a matter. In that circumstance, the U.S. Attorney's Office cannot act as local counsel for the government lawyers brought in from elsewhere to handle the matter.

The requirement that the Federal Government have associated local counsel is also inconsistent with the principles of Supremacy Clause law described above. This requirement improperly imposes costs and burdens directly on the United States as its attorneys appear in Arizona solely to represent the interests of the United States.

E. There is no clear and unambiguous authorization from Congress giving states the power to interfere with the U.S. Attorney General's authority to send officers of the Department of Justice to attend to the interests of the United States in state courts. And, as we have pointed out, absent such Congressional authorization, the imposition of a *pro hac vice* appearance fee on Federal Government Attorneys appearing on behalf of the United States violates the Supremacy Clause.

We note that, pursuant to 28 U.S.C. § 530B, Congress has provided that Federal Government Attorneys are "subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." The text, legislative history, and implementing regulations for Section 530B make clear, however, that it was intended only to subject Federal Government Attorneys to a state bar's ethical standards, and not to undermine the Attorney General's ability to assign federal attorneys in providing representation to the United States.

First, the statute's title, "Ethical standards for attorneys for the Government," indicates its narrow focus. *See Stern v. United States District*

Court, 214 F.3 d 4, 19-20 (1st Cir. 2000); *United States v. Lowery,166* F.3 d 1119,1124-25 (1lth Cir.1999). Second, the legislative history shows that the statute was intended to "insure[] that ... Department of Justice ... lawyers [are subject to] the same rules of ethics that govern the professional conduct of all other attorneys." 144 Cong. Rec. E301-01 (daily ed. March 5, 1998) (extension of remarks of Rep. McDade). Finally, the statute's implementing regulations provide that 28 U.S.C. § 530B "requires Department attorneys to comply with state ... rules of professional responsibility ... but should not be construed in any way ... to interfere with the Attorney General's authority to send Department attorneys into any court in the United States." 28 C.F.R. § 77.1(b); *see also id. at* § 77.2(h)(3) ("The phrase *state laws and rules ... governing attorneys ...* does not include ... [a] statute, rule, or regulation requiring licensure or membership in a particular state bar"). Thus, although the rule change we propose would exempt attorneys from Arizona's *pro hac vice* admission requirements when protecting the interests of the United States, such attorneys would remain subject to state professional responsibility rules to the same extent as private counsel.

F. Adoption of the proposed change to Rule 3 8(a) to exempt Federal Government Attorneys from Arizona's *pro hac vice* admission requirements would be consistent with the practice in other jurisdictions we have surveyed. Indeed, in recognition of the unique mission of Federal Government Attorneys, the District of Columbia expressly exempts such attorneys from its bar-membership requirement. *See*

D.C. Ct. App. R. 49(c)(1). Further, Wyoming exempts from its *pro hac vice* admission rule any Federal Government Attorney appearing in state court on behalf of the United States. *See* Wyo. Bar Rule I I (c)(7). Other states grant an exemption to Federal Government Attorneys from the requirement of paying a fee to appear *pro hac vice.* For example, New Mexico waives its $250 *pro hac vice* admission fee for any attorney who "is employed by a governmental authority and will be appearing on behalf of a governmental authority in the proceeding for which the attorney is registering ..... NMRA Rule 24-106.C. Similarly, Oregon also waives its $250 *pro hac vice* fee for any attorney "employed by a government body [who] will be representing that government body in an official capacity" in the state court proceeding. OR UTCR 3.70(8). In addition, the Department of Justice has found that Colorado, Oklahoma, Utah, Alaska, and Hawaii will grant waivers of the *pro hac vice* application fee to attorneys sent by the Attorney General to represent the interests of the United States in their courts.

We note also that, after inquiry by the U.S. Attorney General, the Director of the Administrative Office of the United States Courts wrote to the clerks of the federal courts in 1988, advising them that Federal Government Attorneys should not be charged admission fees to appear to represent the interests of the United States.

G. In light of the foregoing, Federal Government Attorneys should be exempted from the financial requirements of Rule 38(a), as the well as the requirement that local counsel be associated. As set

forth in Part II below, the proposed change would add a new subparagraph (12) to subpart (a) of the rule, explicitly providing that attorneys appearing in Arizona courts and before Arizona state boards to represent the interests of the United States are not subject to the *pro hac vice* admission requirements. The proposed amendment will obviate the need for Federal Government Attorneys to apply on a case-by-case basis for waiver of the *pro hac vice* admission requirements, and thus relieve the burden of the Arizona Supreme Court and the state bar to consider and act on such individualized requests. DATED this day of February, 2006.

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11. TEXT OF PROPOSED RULE CHANGE

Rule 3 8. Special Exceptions to Standard Examination and Admission Process (a) Admission Pro Hac Vice.

12. Exception for Attorneys Representing the United States of America. The procedures set forth in subpart (a)(1)-(9) of this Rule shall not apply to attorneys appearing solely on behalf of the United States, its officers, employees, or agencies, in Arizona courts and before Arizona State boards, and administrative agencies, in connection with their official duties.

Footnotes

[1] Our Supremacy Clause arguments apply with equal force to other federal agency attorneys appearing on behalf of the Federal Government before state boards and administrative agencies.